

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1938

No. 384

GUARANTY TRUST COMPANY OF NEW YORK, AS
TRUSTEE UNDER ST. LOUIS SOUTHWESTERN
RAILWAY COMPANY FIRST TERMINAL AND
UNIFYING MORTGAGE, DATED JANUARY 1, 1912,
PETITIONER,

vs.

BERRYMAN HENWOOD, TRUSTEE OF ST. LOUIS
SOUTHWESTERN RAILWAY COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 27, 1938.

CERTIORARI GRANTED NOVEMBER 7, 1938.

United States Circuit Court of Appeals
EIGHTH CIRCUIT.

No. 11,172

IN BANKRUPTCY.

**(APPEAL ALLOWED BY UNITED STATES CIRCUIT COURT
OF APPEALS)**

**GUARANTY TRUST COMPANY OF NEW YORK, AS
TRUSTEE UNDER ST. LOUIS SOUTHWESTERN
RAILWAY COMPANY FIRST TERMINAL AND
UNIFYING MORTGAGE DATED JANUARY 1,
1912, APPELLANT,**

vs.

**BERRYMAN HENWOOD, TRUSTEE OF ST. LOUIS
SOUTHWESTERN RAILWAY COMPANY, DEBT-
OR, ST. LOUIS SOUTHWESTERN RAILWAY
COMPANY, AND SOUTHERN PACIFIC COM-
PANY, APPELLEES.**

No. 11,182

IN BANKRUPTCY.

(APPEAL ALLOWED BY UNITED STATES DISTRICT COURT)

**GUARANTY TRUST COMPANY OF NEW YORK, AS
TRUSTEE UNDER ST. LOUIS SOUTHWESTERN
RAILWAY COMPANY FIRST TERMINAL AND
UNIFYING MORTGAGE DATED JANUARY 1,
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COMPANY, AND SOUTHERN PACIFIC COM-
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FILED APRIL 15, 1938.

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Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the May Term, 1938, of said Court, before the Honorable Kimbrough Stone, the Honorable John B. Sanborn and the Honorable Arba S. Van Valkenburgh, Circuit Judges.

Attest:

E. E. KOCH,

Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

(Seal).

Be It Remembered that heretofore, to-wit: on the fifteenth day of April, A. D. 1938, a transcript of record pursuant to an appeal from the District Court of the United States for the Eastern District of Missouri allowed by the United States Circuit Court of Appeals for the Eighth Circuit in a certain cause wherein the Guaranty Trust Company of New York, as Trustee, etc., was Appellant and Berryman Henwood, Trustee, etc., et al., were Appellees; and pursuant to an appeal allowed by the District Court of the United States for the Eastern District of Missouri in a certain cause wherein the Guaranty Trust Company of New York, as Trustee, etc., was Appellant and Berryman Henwood, Trustee, etc., et al., were Appellees, was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, which said transcript as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, is in the words and figures following, to-wit:

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ation on Appeal Allowed by U. S. District Court and Service.)

(Filed April 5th, 1938.)

United States of America:

Berryman Henwood, Trustee of St. Louis Southwestern Railway Company, debtor, St. Louis Southwestern Railway Company and Southern Pacific Company.—
Greeting:

You are hereby cited and admonished to be and appear in United States Circuit Court of Appeals, Eighth Circuit, St. Louis, Missouri, forty days from and after the day this citation bears date, pursuant to an appeal filed in the Clerk's office of the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, wherein Guaranty Trust Company of New York as Trustee under St. Louis Southwestern Railway Company First Terminal and Unifying Mortgage dated January 1, 1912 appellant in error, and you are appellee to show cause, if any there be, why the judgment rendered against the said appellant, as in said appeal mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

In witness, the Honorable Charles B. Davis, Judge of the District Courts of the United States for the Eastern District of Missouri, this 2nd day of April in the year of our Lord one thousand nine hundred and thirty-eight.

CHARLES B. DAVIS,

United States District Judge, for
the Eastern District of Missouri.

Copy of above received this 2nd day of April, 1938.

A. H. KISKADDON,
CARLETON S. HADLEY,
Counsel for Berryman Henwood,
Trustee, St. L. S. W. Ry. Co.,
Debtor.

A. H. KISKADDON,
CARLETON S. HADLEY,
Attorneys for St. Louis South-
western Ry. Co.

Copy of above received this 4th day of April, 1938.

BEN C. DEY,
GEORGE L. BULAND,
Counsel for Southern Pacific Co.

Endorsed: Filed in U. S. District Court on April 5, 1938.

Proof of Claim of Guaranty Trust Company of New York as
Trustee Under Mortgage Dated January 1, 1912, of
St. Louis Southwestern Railway Company Securing
First Terminal and Unifying Mortgage Bonds.

(Filed Sept. 30, 1936.)

In the District Court of the United States, Eastern Division,
Eastern Judicial District of Missouri.

In the Matter of:

St. Louis Southwestern Railway Company, Debtor.

In Proceedings for Reorganization of a Railroad,
No. 8497.

United States of America,

Southern District of New York,

City, County and State of New York—ss.

At the City of New York, in the Southern District of New
York, on the 24th day of September, 1936, came Henry A.
Theis of Haworth, New Jersey, and made oath and says as
follows:

1. Guaranty Trust Company of New York is a corpora-
tion incorporated under the laws of the State of New York
and carrying on business at No. 140 Broadway, (1148) in the
Borough of Manhattan, City, County and State of New York.

Deponent, Henry A. Theis, is a Vice President of said
Guaranty Trust Company of New York and is one of the of-

ficers having supervision of the matters hereinafter set forth, and of the duties of said Guaranty Trust Company of New York under the Mortgage hereinafter mentioned, and the above address is hereby designated as the address to which all notices to Guaranty Trust Company of New York as a creditor shall be mailed.

2. The above named Debtor, St. Louis Southwestern Railway Company, a Missouri corporation, the corporation by which a petition for reorganization under Section 77 of the Bankruptcy Act has been filed herein, was at and before the date of the filing of said petition and of the date of the order of this court approving such petition as properly filed under said Section 77, viz. on December 12, 1935, and still is justly and duly indebted to Guaranty Trust Company of New York as Trustee (hereinafter sometimes referred to as the Claimant) as hereinafter stated.

3. The consideration for said indebtedness and the nature and amount thereof are:

Upon information and belief, the Debtor, shortly prior to April 24, 1912, pursuant to due corporate action; duly authorized the creation of an issue of bonds to be known as its First Terminal and Unifying Mortgage Bonds (hereinafter sometimes called the "bonds"), to be limited in aggregate principal amount as specified in, to be issued in manner and form as provided by, and to be secured by, an (1149) Indenture of Mortgage on the property of the Debtor therein described or referred to.

In order to secure the payment of the principal and interest of all the First Terminal and Unifying Mortgage Bonds issued and to be issued under said Indenture of Mortgage according to their tenor and effect, and to secure the performance of all the covenants and conditions in said Indenture of Mortgage contained, the Debtor, on or about April 24, 1912, pursuant to due corporate action, duly made and executed under its corporate seal and delivered to Guaranty Trust Company of New York and Walker Hill, an individual citizen of the State of Missouri, as Trustees an Indenture of Mortgage (herein sometimes called the Mortgage) dated January 1, 1912, a copy of which is hereto annexed, marked Schedule A and made a part hereof. Guaranty Trust Company of New York and Walker Hill duly accepted the trusts created by the Mortgage and united in the execution thereof to evidence such acceptance. Walker Hill having died Frank C.

Walker Hill on or about September 25, 1925, and still continues as such.

Upon information and belief, there were duly issued for a valuable consideration and are now outstanding under the Mortgage the following bonds of the Debtor in manner and form as provided by and as specified in the Mortgage, which now are the lawfully created, valid and existing obligations of the Debtor and entitled to the lien and security of the Mortgage and are in the hands of numerous bona fide holders for value:

1. 8,082 bonds (pieces) in the form of coupon *bonds in the form set (1150) out beginning on page 3 of the Mortgage.

2. Temporary bonds of various denominations in the aggregate principal amount of \$3,425,000 payable to bearer issued pursuant to Section 5 of Article First of the Mortgage in the form attached hereto as Schedule B and made a part hereof.

3. Registered bonds of various denominations in the aggregate principal amount of \$10,131,000 in the form beginning on page 7 of the Mortgage.

Upon information and belief, the holders and owners of all temporary bonds outstanding under the Mortgage and the holders and owners of all or substantially all the registered bonds outstanding under the Mortgage have tendered to the Debtor all such bonds for cancellation in exchange for coupon bonds in the form specified in the Mortgage and have demanded such coupon bonds in exchange therefor in accordance with the provisions of the Mortgage, to which specific reference is hereby made.

Default has occurred under the provisions of the bonds and of the Mortgage in that, inter alia, default was made in the payment of the instalment of interest payable on said bonds on January 1, 1936, which default has continued for the space of three months and upwards and still continues; and in that default was made in the payment of the instalment of interest which matured on January 1, 1936, under the terms of the Second Mortgage of the Debtor dated February 12, 1891, which default still continues.

The Claimant has elected to receive, and has demanded in Amsterdam, Holland (as evidence whereof there is being transmitted to the Debtor the duly *authen- (1151) ticated certificate of the Bailiff at Amsterdam, Holland, which is here-

by made a part hereof), payment in guilders of the full amount due for principal and interest on all bonds and coupons outstanding under the Mortgage except on those bonds or coupons the holders of which have made their own elections as to the money of payment, and the Claimant hereby confirms such election to receive such payment in guilders or the equivalent of said guilders in dollars at the rate of exchange existing on the date which, according to law, is the appropriate date for converting said guilders into dollars.

At and before December 12, 1935, the date on which the Debtor filed its original petition in these proceedings and on which said petition was approved by order of the court herein, by reason of the matters and things hereinbefore set forth the Debtor was and still is justly and truly indebted to the Claimant in the sum of 53,878,620 guilders in respect of principal of such bonds, together with unpaid interest thereon.

This proof of claim is made for all bonds issued and outstanding under said Mortgage, but the amount of this proof of claim shall be reduced to the extent that valid individual proofs of claim are filed on behalf of said bonds or coupons by the holders thereof, personally or by proxy and by the amount by which the value of guilders exceeds the value of any money other than guilders which any holder or holders of said bonds or coupons validly elect to receive in respect thereof.

4. Subsequent to December 12, 1935 there has become due, and in the future there will also become *due from the Debtor to the Claimant as Trustee (1152) additional interest on the bonds and additional amounts for compensation to the Claimant as Trustee and expenses and liabilities of the Trustee, all of which Debtor is obligated to pay and payment of all of which is or will be secured by the Mortgage, and the compensation, expenses and liabilities of the Claimant as Trustee are or will be so secured prior to the lien of the bonds on the trust estate.

5. For a description of or reference to the security for the above indebtedness, reference is hereby made to said Mortgage, Schedule A hereto, subject to any releases of property and additions or substitutions of property thereunder as have been made from time to time as in said Mortgage provided. Subsequent to the execution and delivery of the Mortgage and in accordance with the provisions thereof, the Debtor duly pledged and delivered to the Claimant as Trus-

tee other securities not specifically described in the Mortgage, the description of which Claimant will produce as and when this Court may direct.

6. To the knowledge or belief of deponent: there exists no set-off or counterclaim to said debt; no note or other evidence of said debt has been received except as aforesaid; no part of said debt has been paid, and no judgment has been recovered therefor or for any part thereof, except on interest coupons maturing January 1 and July 1, 1934, and January 1, 1935, appertaining to certain of the bonds, on which an action entitled Anglo-Continentale Treuhand, A. G. vs. St. Louis Southwestern Railway Company was instituted in the United States District Court for the Southern District of New York. Claimant has not, nor has any other person, to the knowledge or belief of deponent, for the use of the Claimant or holders (1153) of any of said bonds or coupons, had or received any manner of security for said debt whatever, other than the security of the Mortgage.

7. This proof of claim is filed herein pursuant to the aforesaid Mortgage and also pursuant to Order No. 81 of this Honorable Court in these reorganization proceedings filed May 22, 1936, as extended. All rights of the Claimant and holders of the bonds in respect of this claim are hereby expressly reserved, including the right to amend and to make more definite any part thereof.

HENRY A. THEIS,

Vice President of Claimant Guaranty
Trust Company of New York as Trust-
tee as aforesaid.

Subscribed and sworn to before me this 24th day of September, 1936.

LAURENCE E. DARDEN, JR.,
Notary Public.

New York Co. Clk. No. 23.
New York Co. Reg. No. 7-D-77.

My Commission expires March 30, 1937.

(Exhibits filed but not printed.)

Filed Sept. 30, 1936. Jas. J. O'Connor, Clerk.

St. Louis Southwestern Railway Company.

to

Guaranty Trust Company of New York and
Walker Hill,
Trustees.

First Terminal and Unifying Mortgage.

Dated January 1, 1912,

Securing

First Terminal and Unifying Mortgage Bonds.

Interest payable January 1 and July 1.

Principal due January 1, 1952.

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INDENTURE, dated the first day of January, in the year one thousand nine hundred and twelve, by and between St. Louis Southwestern Railway Company, a corporation organized and existing under the laws of the State of Missouri (hereinafter called the "Railway Company"), party of the first part, and Guaranty Trust Company of New York, a corporation organized and existing under the laws of the State of New York (hereinafter called the "Trust Company"), and Walker Hill, a citizen and resident of the State of Missouri, as Trustees (hereinafter called the "Trustees"), parties of the second part.

Parties.

Whereas, the Railway Company is a corporation duly organized under the laws of the State of Missouri and owns and operates a main line of railway extending from Bird's Point on the Mississippi River, in Mississippi County, Missouri, opposite, or nearly opposite, Cairo, Illinois, and thence extending south-westwardly to Texarkana, on the state line between the States of Arkansas and Texas, together with certain branches in the States of Missouri, Arkansas and Louisiana, the aggregate length of such main line and branches being about 622 miles; and

Lines of railway owned and operated by Railway Company.

Whereas, the Railway Company desires to provide for the funding of certain of its indebtedness secured by mortgage or lien, and for making additions to and extensions of its lines of railroad, and for the acquisition of additional terminals and terminal facilities, and also to provide reimbursement for the expenditures made by it in the construction or acquisition of branches and extensions and in the permanent betterment, improvement and equipment of its railroads and property, and for the purchase or acquisition of additional equipment and property, and for such and other corporate purposes desires to borrow money and mortgage its corporate property and franchises; and

Purposes of bond issue and this mortgage.

Whereas, the Railway Company, in pursuance of resolutions of its Board of Directors and of its stockholders, at meetings of said Board and of said stockholders duly convened and held in accordance with law and the by-laws of the Railway Company, has

Corporate action authorizing bonds.

*There are no marginal notes in the original mortgage.

Principal sum
of \$100,000,000.

Payment of
bonds in
foreign
currencies.

determined, for the purposes of this indenture set forth, to create its forty-year mortgage bonds, to be designated "First Terminal and Unifying Mortgage Bonds," limited to an aggregate principal amount of One Hundred Million Dollars (\$100,000,000), at any one time outstanding, to be coupon bonds with provision for registration as to principal, and registered bonds without coupons, to be payable on the first day of January, 1952, with interest at the rate of five per cent. per annum, payable semi-annually on the first days of January and July in each year; said bonds, both as to principal and interest, to be payable at the office or agency of the Railway Company in the Borough of Manhattan, in the City and State of New York, in gold coin of the United States of America of or equal to the standard of weight and fineness as it existed January 1, 1912 (the coupon bonds also to be payable, both as to principal and interest, at such places in the following cities in foreign countries as the Board of Directors may from time to time designate, viz.: London, England, or Amsterdam, Holland, or Berlin, Germany, or Paris, France), and both as to principal and interest without deduction for any tax or governmental charge which the Railway Company or the Trustees may be required or permitted to pay or to retain therefrom under any present or future law of the United States of America or of any state, territory, county, municipality or other taxing authority therein; and

Corporate
action
authorizing
mortgage.

Whereas, for the purpose of securing the payment of said bonds and the interest thereon, the Railway Company, by resolution of its Board of Directors at said meeting of said Board duly called and held, and by the affirmative vote of the persons holding the larger amount in value of the stock of the Railway Company at said meeting of said stockholders duly convened and held in accordance with law and with the by-laws of the Railway Company, has determined to execute and deliver to the parties hereto of the second part, as Trustees, a mortgage and deed of trust, in the terms of this indenture, of the lines of railroad, property (both real and personal) and franchises hereinafter described; and

Whereas, the First Terminal and Unifying Mortgage Coupon Bonds may be payable, at the option of the holder, both as to principal and interest, at some

one or more of the following places in addition to the City of New York, and in the moneys current at such respective places of payment, at the following rates of exchange or equivalents of \$1,000, viz.: In London, England, £205.15.2 Sterling, or in Amsterdam, Holland, 2490 guilders, or in Berlin, Germany, 4200 marks, D. R. W., or in Paris, France, 5180 francs; and

Rates of
exchange.

Whereas, the text of the First Terminal and Unifying Mortgage Bonds is to be in substantially the following form (the blanks in the form of registered bond without coupons to be properly filled as such bonds are issued):

[Form of Coupon Bond.]

No.

\$1,000.
U. S. Gold
£205 15s. 2d. Stg.
Marks 4200, D. R. W.

\$1,000.
U. S. Gold
2490 Guilders
5180 Francs

Form of
coupon bond.

United States of America.

St. Louis Southwestern Railway Company.

First Terminal and Unifying Mortgage Bond.

St. Louis Southwestern Railway Company, a corporation of the State of Missouri (hereinafter called the Railway Company), for value received, hereby promises to pay to the bearer, or, if registered, to the registered holder, of this bond, on the first day of January, 1952, at its office or agency in the Borough of Manhattan, City and State of New York, One Thousand Dollars in gold coin of the United States of America, of or equal to the standard of weight and fineness as it existed January 1 1912, or in London, England, £205 15s 2d, or in Amsterdam, Holland, 2490 guilders, or in Berlin, Germany, marks 4200, D. R. W., or in Paris, France, 5180 francs, and to pay interest thereon, at the rate of five per cent. per annum, from the first day of January, 1912, in said respective currencies, semi-annually on the first day of January and the first day of July in each year, until payment of said principal sum, but only upon presentation and tender, as they severally mature, of the interest coupons annexed hereto. Payment of the principal and interest of this bond will be made, at the holder's option, at the office or agency of the Railway Company

in the Borough of Manhattan, in the City and State of New York, or at designated offices in the foreign cities and countries above mentioned. Both the principal and interest of this bond shall be paid without deduction for any tax or governmental charge which the Railway Company or the Trustees under the mortgage and deed of trust, hereinafter mentioned, may be required or permitted to pay or to retain therefrom under any present or future law of the United States of America or of any state, territory, county, municipality or other taxing authority therein.

This bond is one of a duly authorized issue of First Terminal and Unifying Mortgage Bonds of the Railway Company, limited to the aggregate principal amount of \$100,000,000 at any one time outstanding, issued and to be issued under and equally secured by a mortgage and deed of trust, dated January 1, 1912, duly executed by the Railway Company, to Guaranty Trust Company of New York and Walker Hill, as Trustees, hereinafter termed the First Terminal and Unifying Mortgage. For a description of the properties and franchises mortgaged, the nature and extent of the security, the rights of the holders of said bonds under the same and the terms and conditions upon which said bonds are issued and secured, reference is made to the said First Terminal and Unifying Mortgage. In case an event of default, as defined in the First Terminal and Unifying Mortgage, shall occur, the principal of the First Terminal and Unifying Mortgage Bonds may become or be declared due and payable, in the manner and with the effect provided in the said First Terminal and Unifying Mortgage.

This bond shall pass by delivery unless it is registered in the owner's name at the office or agency of the Railway Company in the Borough of Manhattan, in the City of New York, and such registration is also noted on the bond. After such registration no transfer shall be valid unless made by the registered holder in person or by attorney duly authorized, and similarly noted on the bond by the registrar; but this bond may be discharged from registration and its transferability by delivery be restored by a like transfer to bearer noted hereon, after which it may again, from time to time, be registered or made transferable to bearer as before. Any registration, however, shall not affect the negotiability of the coupons.

always be transferable by delivery. The holder may also, at his option, surrender, for cancellation, this bond with the coupons for future interest thereon, in exchange for a registered bond without coupons, as provided in said mortgage and deed of trust, and on payment of the transfer charges and the expenses incident to such exchange, which said registered bond without coupons may in turn be exchanged for a coupon bond or coupon bonds. No recourse shall be had for the payment of the principal or interest of this bond or any part thereof, nor for any claim based thereon, nor otherwise in respect thereof or of the First Terminal and Unifying Mortgage, against any officer, director or stockholder, past, present or future, of the Railway Company, as such, whether by virtue of any statute or by the enforcement of any assessment or penalty, or otherwise, all such liability being, by the acceptance hereof and as part of the consideration of the issue hereof, expressly released.

This bond shall not be valid or become obligatory for any purpose until it shall have been authenticated by the certificate endorsed hereon executed by Guaranty Trust Company of New York, or by its corporate successor, as Trustee of said First Terminal and Unifying Mortgage.

In witness whereof, St. Louis Southwestern Railway Company has caused this bond to be signed by its President or a Vice-President, and its corporate seal to be hereunto affixed, duly attested by its Secretary or an Assistant Secretary, and coupons for said interest, with the engraved fac-simile signature of its Treasurer, to be attached hereto, as of the first day of January, 1912.

St. Louis Southwestern Railway Company.

By

.....
President.

Attest

.....
Secretary.

And whereas, there are to be attached to said coupon bonds, at the time of the issue thereof, coupons representing the semi-annual instalments of inter-

coupons is to be of substantially the following form (the blanks therein being properly filled), to wit:

[Form of Interest Coupon.]

No.

\$25.

105.05 Marks.

129.50 Francs.

\$25.

£5 2s 10½d.

62.25 Guilders.

On the first day of _____, 19 __, St. Louis Southwestern Railway Company will pay to the bearer, upon presentation and surrender of this coupon for cancellation, at its office or agency in the Borough of Manhattan, in the City of New York, Twenty-five Dollars (\$25) in United States gold coin, or in London, England, £5 2s. 10½d. Sterling, or in Amsterdam, Holland, 62.25 guilders, or in Berlin, Germany, 105.05 marks, or in Paris, France, 129.50 francs, being six months' interest then due upon its First Terminal and Unifying Mortgage Bond, No.

Treasurer.

[Form of Registered Bond.]

No.

\$

United States of America.

St. Louis Southwestern Railway Company.

First Terminal and Unifying Registered Mortgage Bond.

St. Louis Southwestern Railway Company, a corporation of the State of Missouri (hereinafter called the Railway Company), for value received, hereby promises to pay to

or registered assigns on the first day of January, 1952, at its office or agency in the Borough of Manhattan, City and State of New York,

Dollars in gold coin of the United States of America, of or equal to the standard of weight and fineness as it existed January 1, 1912, and to pay interest thereon, at the rate of five per cent. per annum, from the first day of January or July, as the case may be, next preceding the date of this bond (unless this bond be dated January 1 or July 1, and in that event from its date), in like gold coin, semi-annually on the first day of January and the first day of July in each

year, until payment of said principal sum. Payment of the principal and interest of this bond will be made at the office or agency of the Railway Company in the Borough of Manhattan in the City and State of New York. Both the principal and interest of this bond shall be paid without deduction for any tax or governmental charge which the Railway Company or the Trustees under the mortgage and deed of trust, hereinafter mentioned, may be required or permitted to pay or to retain therefrom under any present or future law of the United States of America or of any state, territory, county, municipality or other taxing authority therein.

This bond is one of a duly authorized issue of First Terminal and Unifying Mortgage Bonds of the Railway Company, limited to the aggregate principal amount of \$100,000,000 at any one time outstanding, issued and to be issued under and equally secured by a mortgage and deed of trust, dated January 1, 1912, duly executed by the Railway Company to Guaranty Trust Company of New York and Walker Hill as Trustees, hereinafter termed the First Terminal and Unifying Mortgage. For a description of the properties and franchises mortgaged, the nature and extent of the security, the rights of the holders of said bonds under the same and the terms and conditions upon which said bonds are issued and secured reference is made to the said First Terminal and Unifying Mortgage. In case an event of default, as defined in the First Terminal and Unifying Mortgage, shall occur, the principal of the First Terminal and Unifying Mortgage Bonds may become or be declared due and payable, in the manner and with the effect provided in the said First Terminal and Unifying Mortgage.

This bond is transferable by the registered holder in person or by attorney duly authorized at the office or agency of the Railway Company in the Borough of Manhattan, in the City of New York, upon surrender and cancellation of this bond, and thereupon a new registered bond will be issued to the transferee in exchange therefor, as provided in said First Terminal and Unifying Mortgage; or the registered owner hereof, at his option, may surrender the same for cancellation and in exchange for a like amount of the principal thereof in coupon bonds, having coupons at-

tached maturing on and after the next ensuing interest due date, which said coupon bonds may in turn be exchanged for a registered bond or registered bonds without coupons. No recourse shall be had for the payment of the principal or interest of this bond or any part thereof, nor for any claim based thereon, nor otherwise in respect thereof or of the First Terminal and Unifying Mortgage, against any officer, director or stockholder, past, present or future, of the Railway Company, as such, whether by virtue of any statute or by the enforcement of any assessment or penalty, or otherwise, all such liability being, by the acceptance hereof and as part of the consideration of the issue hereof, expressly released.

This bond shall not be valid or become obligatory for any purpose until it shall have been authenticated by the certificate endorsed hereon executed by Guaranty Trust Company of New York, or by its corporate successor, as Trustee of said First Terminal and Unifying Mortgage.

In witness whereof, St. Louis Southwestern Railway Company has caused this bond to be signed by its President or a Vice-President, and its corporate seal to be hereunto affixed duly attested by its Secretary or an Assistant Secretary, the day of

, 19

St. Louis Southwestern Railway Company,

By

President.

Attest:

Secretary.

And whereas, on each of the bonds issued under and secured by this indenture there is to be endorsed a certificate of Guaranty Trust Company of New York, as Trustee under said indenture, or by its corporate successor, that it is one of the bonds described in this indenture; and no bond shall be secured by this indenture or shall be obligatory for any purpose unless such certificate shall have been executed by said Trustee or by its corporate successor, said certificate to be of substantially the following tenor, to wit:

[Form of Trustee's Certificate.]

Form of
Trustee's
certificate.

This bond is one of the bonds described in the within mentioned mortgage and deed of trust.

Guaranty Trust Company of New York,

Trustee.

By

And whereas, all things necessary to make such bonds, when executed by the Railway Company and authenticated by Guaranty Trust Company of New York, or by its corporate successor, as Trustee under said mortgage and deed of trust, the valid, binding and legal obligations of the Railway Company, and to constitute these presents a valid, binding and legal mortgage and deed of trust for the security thereof, have been done and performed, and the execution of said bonds and of this indenture has in all respects been duly authorized, and the Railway Company proposes to issue the bonds hereby secured in the exercise of each and every legal right and power in it vested:

Now, therefore, this indenture witnesseth:

That in order to secure the payment of the principal and interest of all of said bonds at any time issued and outstanding under this indenture, according to their tenor, purport and effect, as well the interest thereon as the principal thereof, and to secure the performance and observance of all the covenants and conditions therein or herein contained, and to declare the terms and conditions upon which such bonds are and are to be authenticated and delivered and received, the Railway Company, party of the first part, in consideration of the premises and of the acceptance or purchase of said bonds by the holders thereof, and of the sum of \$100, lawful money of the United States of America, to it duly paid by the Trustees at or before the ensembling and delivery of these presents, the receipt whereof is hereby acknowledged, has executed and delivered these presents, and has granted, bargained, sold, aliened, remised, released, conveyed, confirmed, assigned, transferred, pledged and set over, and by these presents does grant, bargain, sell, alien, remise, release, convey, confirm, assign, transfer, pledge and set over, unto the Trustees, parties hereto of the second part, their successors and assigns for-

Granting
clauses.

ever, all and singular the railroads, properties, franchises, rights, powers and privileges of the Railway Company which are more particularly described as follows:

Properties
mortgaged;
Line of rail-
way.

All and singular the line of railway of the Railway Company, party hereto of the first part, in the States of Missouri, Arkansas and Louisiana, extending from Bird's Point on the Mississippi River in Mississippi County, State of Missouri, opposite or nearly opposite Cairo, Illinois, and extending westwardly through the Counties of Mississippi, New Madrid and Dunklin, in the State of Missouri, to the line between the States of Missouri and Arkansas; thence through the Counties of Clay, Greene, Craighead, Poinsett, Cross, St. Francis, Woodruff, Monroe, Prairie, Arkansas, Jefferson, Cleveland, Dallas, Calhoun, Ouachita, Columbia, Lafayette and Miller, in the State of Arkansas, to the state line between the States of Arkansas and Texas at Texarkana, a distance of about 418.9 miles; also a branch or extension from Lilbourn, in the County of New Madrid, to and into the town of New Madrid, in the State of Missouri, a distance of about 6.1 miles; also a branch or extension from the town of Malden, Dunklin County, Missouri, northwestwardly through the Counties of Dunklin, Stoddard and Cape Girardeau, to a junction with the St. Louis, Iron Mountain and Southern Railway at Delta in said last-named county, a distance of about 51.4 miles; also a branch or extension from the town of Altheimer, in the County of Jefferson, State of Arkansas, northwestwardly through the Counties of Jefferson, Lonoke and Pulaski, to the City of Argenta, Arkansas, a distance of about 42.9 miles; also a branch or extension from the town of McNeil, Columbia County, Arkansas, to Magnolia, Arkansas, a distance of about 6.4 miles; also a branch or extension from the town of Lewisville, in the County of Lafayette, in the State of Arkansas, southwardly through said County of Lafayette, Arkansas, and Bossier and Caddo Parishes, Louisiana, to Shreveport, Louisiana, a distance of about 61.2 miles; being a total distance of main line and branches or extensions of about 586.9 miles.

—subject to
certain
mortgages

Subject, however, as to the lines of railroad and appurtenant property above described, to the following mortgages or deeds of trust, namely:

1. A mortgage or deed of trust, dated February 12, 1891, made by St. Louis Southwestern Railway Company to Central Trust Company of New York, as trustee, known as the First Mortgage of the Railway Company, under which bond certificates are outstanding in the principal amount of \$20,000,000, maturing November 1, 1989.

2. A certain mortgage or deed of trust, dated February 12, 1891, made by St. Louis Southwestern Railway Company to The Mercantile Trust Company (now Bankers Trust Company), as trustee, known as the Second Mortgage of the Railway Company, under which bond certificates are outstanding in the principal amount of \$10,000,000, maturing November 1, 1989.

3. A certain mortgage or deed of trust, dated June 1, 1902, made by St. Louis Southwestern Railway Company to Bowling Green Trust Company (now The Equitable Trust Company of New York) and David R. Francis, as trustees, known as the First Consolidated Mortgage of the Railway Company, under which bonds are authorized in the principal amount of \$25,000,000 and are outstanding in the principal amount of \$22,261,750, maturing June 1, 1932.

Also the line of railroad owned by the Railway Company and formerly owned by the Stuttgart and Arkansas River Railroad Company, extending from Stuttgart, in Arkansas County, to its terminus at Gillett, in said county, a distance of about 35.1 miles.

Also line of railroad formerly owned by Stuttgart and Arkansas River Railroad Company—

Subject, however, as to said line of railroad last above mentioned, to the lien of the aforesaid First Consolidated Mortgage of the Railway Company and to all of the conditions and provisions of said mortgage.

—subject to lien of First Consolidated Mortgage.

Also any and all roadbeds, superstructures, rights-of-way, rails, tracks, side-tracks, bridges, viaducts, buildings, depots, stations, warehouses, car-houses, engine-houses, freight-shops, coal-houses, wood-houses, machine-shops and other shops, turntables, water-stations, fences, docks, structures, erections, fixtures and all other things of whatever kind now owned or

Other property including —Appurtenances and equipment.

successors and appertaining to any of the lines of railway, branches or extensions above described, or appertaining to any line of railway, branch or extension, or other property, now or hereafter owned by the Railway Company and subject to the lien of this indenture.

—Tolls, revenues, earnings, etc.

Also all tolls, revenues, earnings, income, rents, issues and profits of said lines of railway, extensions and branches, or of any part thereof, now or hereafter subject to the lien of this indenture, and all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the Railway Company, of, in and to the said lines of railway, extensions and branches, and every part and parcel thereof, with the appurtenances and franchises heretofore or hereafter appertaining thereto.

—Property procured through the use of bonds secured hereby.

Also any and all lines of railway, extensions and branches, telegraph and telephone lines, including the franchises appertaining thereto, and any and all terminal properties, depots, shops, machinery, tools, docks, wharves, ferries, landings, boats, rolling stock and other equipment, and any and all bonds, stocks and other property of every kind and description (notwithstanding that the same are not now particularly set forth in this indenture) which from time to time, in the manner hereinafter provided, shall be purchased, acquired or constructed by the use of any bonds secured by this indenture; together with all and singular the franchises, rights and privileges appertaining to or used in connection with such lines of railway, extensions, branches, telegraph and telephone lines, and any and all the rents, issues, profits, tolls and other incomes therefrom.

—Additions, improvements and betterments.

Also any and all additions, improvements and betterments, now or hereafter acquired or constructed, to or upon or in connection with any and all lines of railway, extensions and branches now or at any time hereafter subject to this indenture; any and all property (real or personal) of every kind and description, acquired for use upon or in connection with or for the purpose of such lines of railway, extensions or branches, and any and all corporate rights, privileges and franchises which the Railway Company now has or hereafter may or shall acquire, possess or exercise or be entitled to exercise, in, to, upon or in respect of such lines of railway, extensions or branches or

—Corporate rights, privileges and franchises.

any part thereof, necessary for or appertaining to the construction, maintenance or operation of said lines of railway, extensions or branches, and any and all the rents, issues, profits, tolls and other income of said lines of the Railway Company and of any and all such extensions and branches, and also any and all of the rights, privileges, franchises, properties (real or personal) and things which the Railway Company may or shall hereafter possess or become entitled to possess for the purposes of or in connection with such lines of railway or any such extensions or branches.

—Rents, issues, profits, tolls and other income:

Subject, however, as to any premises, railways and properties now owned or which may be hereafter acquired by the Railway Company, to the mortgages and liens hereinbefore mentioned, in so far, but only in so far, as the same may be their terms respectively attach to said premises, railways and properties, and to any liens thereon existing at the time of such acquisition by the Railway Company.

Subject to previously described mortgages.

Also all the right, title and interest of the Railway Company in and under all leases, traffic agreements and trackage rights or contracts.

—Leases, traffic agreements and trackage rights and contracts.

Also the following shares of stock, which are hereby pledged with the Trustees hereunder, viz.:

—Shares of stock.

24,955 shares, of the par value of \$100 each, of the capital stock of St. Louis Southwestern Railway Company of Texas.

Subject, however, as to said shares of stock, to the liens of the above-mentioned First Mortgage, Second Mortgage and First Consolidated Mortgage of St. Louis Southwestern Railway Company, and to the pledge and deposit of said stock under said First Mortgage.

Subject to liens of certain mortgages.

Also the following described bonds, which are hereby pledged with the Trustees hereunder, viz.:

—Bonds.

Four Per Cent. First Mortgage Gold Bond of St. Louis Southwestern Railway Company of Texas, in the principal amount of \$9,445,000, dated January 13, 1891, and maturing November 1, 1989, and secured by a mortgage dated January 13, 1891, to Central Trust Company of New York, as trustee, being the entire amount of indebtedness secured by said mortgage.

Four Per Cent. First Mortgage Gold Bond of the Tyler Southeastern Railway Company, in the principal amount of \$660,000 dated, January 13, 1891, and maturing November 1, 1899, and secured by a mortgage dated January 13, 1891, to The Mercantile Trust Company (now Bankers Trust Company), as trustee, being the entire amount of indebtedness secured by said mortgage.

Subject to
First
Mortgage.

Subject, however, as to said bonds, to the lien of the above mentioned First Mortgage of St. Louis Southwestern Railway Company, and to the pledge and deposit of said bonds under said First Mortgage.

—Bonds.

Also the following described bonds, which are hereby pledged with the Trustees hereunder, viz.:

Four Per Cent. Second Mortgage Gold Income Bond of St. Louis Southwestern Railway Company of Texas, in the principal amount of \$4,722,500, dated January 13, 1891, maturing November 1, 1899, and secured by a mortgage, dated January 13, 1891, to the Central Trust Company of New York, as trustee, and being the entire amount of indebtedness secured by said mortgage.

Four Per Cent. Second Mortgage Gold Income Bond of the Tyler Southeastern Railway Company, in the principal amount of \$330,000, dated January 13, 1891, maturing November 1, 1899, and secured by a mortgage, dated January 13, 1891, to The Mercantile Trust Company (now Bankers Trust Company), as trustee, and being the entire amount of indebtedness secured by said mortgage.

Subject to
liens of certain
other
mortgages.

Subject, however, as to the bonds above described, to the liens of the above-mentioned Second Mortgage and First Consolidated Mortgage of St. Louis Southwestern Railway Company, and to the pledge and deposit of said bonds under said Second Mortgage.

—Bonds and
Stock.

Also, all of the following described bonds and stock, which are hereby pledged with the Trustees hereunder, that is to say:

First Mortgage Bonds of the Dallas Terminal Railway and Union Depot Company, in the principal amount of \$731,000, dated April 1,

1903, maturing April 1, 1933, and being all of the outstanding bonds of said issue.

First Mortgage Dallas Branch Bonds of St. Louis Southwestern Railway Company of Texas, in the principal amount of \$280,000, dated April 1, 1903, maturing April 1, 1933, and being all of the outstanding bonds of said issue.

First Mortgage Lufkin Extension Bonds of St. Louis Southwestern Railway Company of Texas, in the principal amount of \$292,000, dated August 1, 1903, maturing August 1, 1933, and being all of the outstanding bonds of said issue.

First Mortgage Bonds of the Pine Bluff Arkansas River Railway Company, in the principal amount of \$126,000, dated February 1, 1898, maturing February 1, 1928, and being all of the outstanding bonds of said issue.

Second Mortgage Income Bond Certificates of St. Louis Southwestern Railway Company, in the principal amount of \$6,957,500, dated January 13, 1891, maturing November 1, 1989, out of an authorized and outstanding issue of \$10,000,000, principal amount, of said bond certificates.

93 shares, of the par value of \$100 each, of the capital stock of the Dallas Terminal Railway and Union Depot Company, being all of the outstanding stock (except qualifying shares) of said Company.

1,995 shares, of the par value of \$100 each, of the capital stock of the Pine Bluff Arkansas River Railway Company, being all of the outstanding stock (except qualifying shares) of said Company.

4,535 shares, of the par value of \$100 each, of the capital stock of the Eastern Texas Railroad Company, being all of the outstanding stock (except qualifying shares) of said Company.

Subject, however, as to the bonds and stock above described, to the lien of the above-mentioned First Consolidated Mortgage of St. Louis Southwestern

Subject to
lien of First
Consolidated
Mortgage.

Railway Company, dated June 1, 1902, and to the pledge and deposit of said bonds and stock under said First Consolidated Mortgage.

Stock.

Also all of the following described stock, which is hereby pledged with and delivered to the Trustees hereunder, that is to say:

4,995 shares, of the par value of \$100 each, of the capital stock of the Gray's Point Terminal Railway Company, being all of the outstanding stock (except qualifying shares) of said Company.

475 shares, of the par value of \$100 each, of the capital stock of the Shreveport Bridge and Terminal Company, being all of the outstanding stock (except qualifying shares) of said Company.

1,495 shares, of the par value of \$100 each, of the capital stock of the Central Arkansas and Eastern Railway Company, being all of the outstanding stock (except qualifying shares) of said Company.

1,374 shares of the par value of \$100 each, of the capital stock of the Stephenville North and South Texas Railway Company, being all of the outstanding stock (except qualifying shares) of said Company.

Also property, including stocks and bonds, hereafter expressly subjected hereto.

Also any and all property, real or personal, of every name, kind and nature whatsoever, including stocks and bonds which from time to time hereafter, by delivery or by writing of any kind, for the purposes hereof, may be conveyed, mortgaged, pledged, assigned or transferred by the Railway Company, or by any one in its behalf, to the Trustees, who hereby are authorized to receive any property, at any and all times, as and for additional security for the payment of the bonds issued or to be issued hereunder, and to receive and hold any and all such property upon the trusts and subject to the terms hereof.

Lien hereof to attach as property is acquired.

And it is covenanted and declared that all railroads, franchises, rolling stock and property, real and personal, of every kind and description, and any interest therein, which by any covenant or provision of this indenture the Railway Company has subjected or agreed to subject to the lien hereof, shall immediately

when acquired by the Railway Company, and subject to the terms and conditions of such acquisition and without any further conveyance, assignment or delivery, become and be subject to the lien of this indenture as fully and completely as though now owned by the Railway Company and expressly and specifically embraced in the foregoing clauses of this indenture; but the Railway Company covenants and agrees that at any and all times it will execute and deliver to the Trustees any and all further conveyances thereof or instruments of further assurance, as the Trustees may reasonably direct or require, for the purpose of expressly and specifically subjecting the same to the lien of this indenture, but it is hereby expressly covenanted and declared that the Railway Company reserves the right to acquire any railroad, branch, extension or equipment, and any stocks, bonds, securities and other property, of any kind or description, free from the lien of this indenture, and any railroad, branch, extension or equipment and any stocks, bonds, securities and other property, of any kind and description, acquired by the Railway Company without the use of bonds or proceeds of bonds issued hereunder, or constructed or acquired by the use of any such bonds or the proceeds of any such bonds as may be delivered to the Railway Company as hereinafter provided in reimbursement of expenditures then already made out of other resources, for any purposes for which bonds are hereinafter provided to be issued, shall be free from the lien of this indenture, unless specifically pledged thereunder by an instrument in writing executed by the Railway Company to the trustees hereof.

Acquisition of
property free
from lien hereof.

To have and to hold the premises, railways, properties (real and personal), rights, franchises, estates, appurtenances, stocks and bonds hereby conveyed or assigned, or intended to be conveyed or assigned, unto the Trustees, their successors and assigns forever.

Habendum.

Subject, however, as to the properties, both real and personal, severally embraced therein or subject thereto, to the several mortgages or indentures heretofore mentioned and to all other existing rights, liens, charges and claims of record upon and against the railways, properties and franchises hereby conveyed and mortgaged, or so intended to be.

In trust, nevertheless, for the common and equal use, benefit and security of all and singular the person

Grant in trust
purposes.

or persons, firm or firms, bodies politic or corporate, who shall from time to time be holders of said bonds or coupons, without preference of any of said bonds over any of the others by reason of priority in the time of issue or negotiation thereof, or otherwise howsoever, subject to the terms, provisions and stipulations in said bonds contained, and for the uses and purposes and upon and subject to the terms, conditions, provisions and agreements in this indenture expressed and declared.

Covenants.

And it is hereby covenanted and declared that all such bonds, which are hereinafter sometimes termed First Terminal and Unifying Mortgage Bonds, are to be executed, authenticated and delivered, and that the mortgaged property and premises are to be held and disposed of by the Trustees subject to the further covenants, conditions, uses and trusts hereinafter set forth; and the Railway Company hereby covenants and agrees to and with the Trustees, and for the benefit of the respective holders from time to time of bonds issued hereunder, as follows, viz.:

FORM,
EXECUTION,
DELIVERY,
REGISTRATION
AND EXCHANGE
OF BONDS.

Article First.

Execution,
authentication
and delivery of
bonds.

Total
authorized
issue,
\$100,000,000.

Rate of
interest.

Section 1. From time to time the First Terminal and Unifying Mortgage Bonds shall be executed on behalf of the Railway Company, and delivered to the Trust Company for authentication by it, and thereupon, as provided in Article Second hereof and not otherwise, the Trust Company shall authenticate and deliver the same. The amount of the First Terminal and Unifying Mortgage Bonds which may be executed by the Railway Company and authenticated by the Trust Company is limited, so that never at any one time shall there be outstanding under this indenture First Terminal and Unifying Mortgage Bonds for an aggregate principal amount exceeding the sum of one hundred million dollars (\$100,000,000). The First Terminal and Unifying Mortgage Bonds shall bear interest at the rate of five per centum per annum, and such interest shall be payable semi-annually on the first day of January and the first day of July in each year.

Adoption of
acts of former
officers.

In case the officers of the Railway Company who shall have signed and sealed any of the First Terminal and Unifying Mortgage Bonds shall cease to be such

signed and sealed shall have been actually authenticated and delivered by the Trust Company, such bonds may, nevertheless, be adopted by the Railway Company and be authenticated and delivered and issued as though the persons who signed and sealed such bonds had not ceased to be officers of the Railway Company. The coupons to be attached to such bonds shall be authenticated by the engraved fac-simile signature of the present Treasurer or of any future Treasurer of the Railway Company, and the Railway Company may adopt and use for that purpose the engraved fac-simile signature of any person who shall have been such Treasurer, notwithstanding the fact that he may have ceased to be such Treasurer at the time when such bonds shall be actually authenticated and delivered. Only such bonds as shall bear thereon endorsed a certificate substantially in the form hereinbefore recited, executed by the Trust Company, shall be secured by this indenture or entitled to any lien, right, or benefit hereunder; and such authentication by the Trust Company upon any such bond shall be conclusive evidence that the bond so authenticated has been duly issued hereunder and that the holder is entitled to the benefit of the trust hereby created. Before authenticating or delivering any coupon bond, all coupons thereon then matured shall be cut off and cancelled and, on its written demand, delivered to the Railway Company. On request of the Railway Company, but within the limitations hereinafter prescribed, First Terminal and Unifying Mortgage Bonds shall be authenticated and delivered hereunder in advance of the registration or recording of this indenture, but the Railway Company, with all convenient speed, shall cause this indenture to be duly recorded.

Signature of
coupons.

Authenti-
cation.

Authentication
before
recording.

Section 2. The Railway Company will keep, at an office or agency to be maintained by it in the Borough of Manhattan in the City of New York, or at some bank or trust company in said Borough, a sufficient register or registers for the registration and transfer of First Terminal and Unifying Mortgage Bonds, and such register or registers shall at all reasonable times be open for inspection by the Trustees; and, upon presentation for such purpose, the Railway Company will, under such reasonable regulations as it may prescribe,

Registration
and transfer
books to be
kept.

istration of
pon bonds.

transfer of
pon bonds
registered as
principal.

Subject to the provisions of Section 3 of this Article First, the holder of any coupon First Terminal and Unifying Mortgage Bond may have the ownership thereof registered on said books of the Railway Company at its said office or agency and such registration noted on the bond. After such registration, no transfer shall be valid unless made on said books by the registered holder, in person or by his attorney duly authorized, and similarly noted on the bond. Upon presentation to the bond registrar of the Railway Company, at such office or agency, of any such coupon bond registered as to principal, accompanied by delivery of a written instrument of transfer in the form approved by the Railway Company, executed by the registered holder, such bond shall be transferred upon such register by the registered holder, in person or by attorney duly authorized, and such transfer shall be noted by such bond registrar upon the bond. The registered holder of any such coupon bond, registered as to principal, also shall have the right to cause the same to be registered as payable to bearer, in which case transferability by delivery shall be restored, and thereafter the principal of such bond when due shall be payable to the person presenting the bond; but any such bond registered as payable to bearer may be registered again in the name of the holder with the same effect as a first registration thereof. Successive registrations and transfers as aforesaid may be made from time to time as desired, and each registration of a bond shall be noted by the bond registrar on the bond. Registration of any of the coupon First Terminal and Unifying Mortgage Bonds as to principal, however, shall not affect the negotiability by delivery merely of the coupons belonging to such bond, but every such coupon shall continue to pass by delivery and shall remain payable to bearer.

range of
on bonds
registered

The holder of any coupon bond or bonds may, at any time, surrender the same with all unmatured coupons thereto appertaining, for cancellation, and receive in exchange therefor a like principal amount in registered bonds without coupons as hereinafter provided, and the registered holder of any registered bond or bonds without coupons, at his option, may at any time surrender the same for cancellation and receive in exchange therefor a like principal amount in coupon bonds as hereinafter provided.

ered bond without coupons shall be transferable only by the registered owner thereof, in person or by his duly authorized attorney, on said books of the Railway Company at its office or agency in the Borough of Manhattan, in the City of New York, and, upon the surrender and cancellation thereof, one or more new registered bonds without coupons will be issued to the transferee in exchange therefor as hereinafter provided.

Exchange of registered bonds for coupon bonds.

Transfer of registered bonds without coupons.

Registered bonds.

The registered bonds without coupons shall be of the denomination of \$1,000, or of such multiples thereof, as the board of directors of the Railway Company may, by resolution, from time to time authorize. The registered bonds shall respectively be dated the day of delivery, and shall bear interest from the first day of January or July, as the case may be, next preceding the date of the bonds, unless dated January 1st or July 1st, and in that event from the date thereof. Whenever any bonds or bonds shall be issued originally as a registered bond or bonds without coupons, there shall be reserved by the Railway Company, unissued, an aggregate face amount of coupon bonds equal to the aggregate face amount of the registered bond or bonds so issued, and the serial number or numbers of the coupon bonds so reserved "unissued" shall by the Railway Company be endorsed on such registered bond or bonds. Whenever any such registered bond or bonds shall be surrendered for transfer, the Railway Company shall issue and the Trust Company shall authenticate and deliver, upon surrender and cancellation of the bond or bonds transferred, a new registered bond or bonds for a like principal amount, which shall have endorsed thereon the same serial number or numbers of coupon bonds which were endorsed upon the registered bond or bonds so surrendered and cancelled. The holder of any registered bond may also exchange such bond, upon surrender and cancellation thereof, for coupon bonds of like principal amount, bearing all unmatured coupons for interest, and bearing the serial number or numbers endorsed upon the registered bond so surrendered and cancelled. Whenever any coupon bond or bonds, together with all unmatured coupons thereto belonging, shall be surrendered for exchange for registered bonds without coupons, the Railway Company shall issue and the Trust Company shall authenticate

Reservation of coupon bonds against registered bonds.

Manner of transfer.

Manner of exchange.

Surrendered
bonds to be
canceled.

principal amount of such registered bonds, which shall have endorsed thereon the serial number or numbers borne by the coupon bond or bonds so surrendered for exchange. In every case of such exchange, the Trust Company forthwith shall cancel the surrendered bond or bonds and coupons, and upon demand shall deliver the same to the Railway Company.

Charge for -
exchange or
transfer.

For any exchange of coupon bonds for registered bonds without coupons, or of such registered bonds for coupon bonds, and for any transfer of registered bonds without coupons, the Railway Company, at its option, may require the payment of a sum sufficient to reimburse it for any stamp tax or other governmental charge, and may also require the payment of a further sum not exceeding five dollars for each new bond issued upon such transfer or exchange.

Ownership of
bonds and
coupons.

Section 3. As to all registered bonds without coupons and all coupon bonds registered as to principal, the person in whose name the same shall be registered on the books of the Railway Company shall, for all purposes of this indenture, be deemed and regarded as the owner thereof, and thereafter payment of or on account of the principal of such bond, if it be a registered coupon bond, and of the principal and interest, if it be a registered bond without coupons, shall be made only to or upon the order of such registered holder thereof, but such registration may be changed as above provided. All such payments shall be valid and effectual to satisfy and discharge the liability upon such bonds to the extent of the sum or sums so paid. The Railway Company and the Trust Company may deem and treat the bearer of any coupon bond which shall not at the time be registered as to principal and the bearer of any coupon for interest on any coupon bond, whether such bond shall be registered or not, as the absolute owner of such bond or coupon for the purpose of receiving payment thereof, and for all other purposes whatsoever, and the Railway Company and the Trust Company shall not be affected by any notice to the contrary.

Coupon bonds
—where
payable and
in what
currencies.

Section 4. All or any of the coupon bonds issued hereunder from time to time shall be payable at the office or agency of the Railway Company in the Borough of Manhattan in the City and State of New York, or, at the option of the holders of said coupon bonds,

in the cities and countries, respectively, and in the respective currencies stated in the form of coupon bond hereinbefore set forth, but the face amount of each of such coupon bonds shall be \$1,000 in United States gold coin of the standard of weight and fineness existing on January 1, 1912, or the equivalent thereof, calculated at the rates of exchange stated in the form of coupon bond hereinbefore set forth. The principal amount of First Terminal and Unifying Bonds which the Railway Company shall be entitled to issue under the provisions of this indenture shall be ascertained at the like rate or rates of exchange, and, for all purposes of this indenture and of said bonds, the indebtedness represented by said bonds in United States gold coin, as aforesaid, shall be calculated at the like rate or rates of exchange.

Section 5. Until definitive engraved First Terminal and Unifying Mortgage Bonds can be prepared, the Railway Company may execute and, upon the request of the Railway Company, the Trust Company shall authenticate and deliver, in lieu of such definitive engraved bonds and subject to the same provisions, limitations and conditions, temporary bonds of any denomination, substantially of the tenor and form of the bonds hereinbefore recited, but without coupons, and with appropriate omissions, insertions and variations, as may be required.

Temporary
bonds.

Upon surrender of such temporary bonds for exchange, the Railway Company, at its own expense, shall prepare and execute, and, upon cancellation of such surrendered bonds, the Trust Company shall authenticate and shall deliver in exchange therefor, definitive engraved First Terminal and Unifying Mortgage Bonds, for the same principal sum in the aggregate as the temporary bonds surrendered and otherwise in accordance with said temporary bonds, and, until so exchanged, the temporary bonds shall, in all respects, be entitled to the same lien and security of this indenture as the definitive engraved bonds issued and authenticated hereunder, and interest, when and as payable, shall be paid and endorsed thereon.

Section 6. In case any coupon bond issued under this indenture, with the coupons thereto appertaining, or any registered bond without coupons, shall become mutilated or be destroyed or lost, the Railway Company, in its discretion, may execute, and thereupon

Replacing
bonds
mutilated,
destroyed or
lost.

the Trust Company shall authenticate and deliver, a new bond of like tenor and date, bearing the same serial number, in exchange and substitution for and upon cancellation of the mutilated coupon bond and its coupons or the mutilated registered bond, or in lieu of and substitution for, the coupon bond and its coupons or the registered bond so destroyed or lost. The applicant for such substituted bond shall furnish the Railway Company and the Trust Company evidence of the destruction or loss of such coupon bond and its coupons, or of such registered bond so destroyed or lost, which evidence shall be satisfactory to the Railway Company and the Trust Company, respectively, in their discretion; and said applicant shall also furnish indemnity satisfactory to the Railway Company and the Trust Company in their discretion, and shall comply with such other reasonable regulations as the Railway Company or the Trust Company may prescribe. The Trust Company shall incur no liability for anything done under this Section 6.

Article Second.

The Trust Company shall authenticate the First Terminal and Unifying Mortgage Bonds and deliver the same as hereinafter in this Article Second provided.

Section 1. Two million six hundred and eighty-five thousand Dollars (\$2,685,000), face amount, of First Terminal and Unifying Mortgage Bonds shall, as soon as may be after the execution and delivery of this indenture, and without any further action on the part of the Railway Company, be authenticated by the Trust Company and be delivered to the Railway Company, upon the written order of the Railway Company signed or purporting to be signed by its President or a Vice-President and by its Treasurer or an Assistant Treasurer, under its corporate seal. The bonds so delivered to the Railway Company or their proceeds, shall be held and may be used by it in reimbursement of expenditures or advances heretofore made out of its revenues for betterments and improvements and for its general corporate purposes, free and discharged from any restrictions.

Section 2. Two million Dollars (\$2,000,000), face amount, of First Terminal and Unifying Mortgage

TERMINAL AND UNIFYING MORTGAGE BONDS
WHICH BONDS
ARE RESE

2,685,000 of
bonds in
reimbursement
of expenditures
and advances
made out of
revenues for
betterments
and improvements.

2,000,000 of
bonds for
terminal

of this indenture and upon the conveyance to the Trustees by a good and sufficient deed of conveyance, free from all liens and encumbrances, and upon the trusts and subject to the terms and conditions set forth in this indenture of the following described real estate situate in the City of St. Louis, State of Missouri, for use as terminal property and facilities, to wit:

All of city blocks Nos. two hundred and thirty (230), two hundred and thirty-one (231) and two hundred and thirty-two (232) in the City of St. Louis, Missouri, bounded on the north by Florida Street, on the west by First Street, on the east by Lewis Street, and on the south by Dickson Street,

shall be authenticated by the Trust Company and delivered to the grantor or grantors named in said deed of conveyance, or upon the written order of said grantor or grantors, said bonds in said amount of Two Million Dollars (\$2,000,000), being the amount thereof required in order to acquire such property.

Section 3. Two hundred and fifty thousand Dollars (\$250,000), face amount, of First Terminal and Unifying Mortgage Bonds immediately upon the execution and delivery of this indenture and upon the conveyance to the Trustees by a good and sufficient deed of conveyance, free from all liens and encumbrances, and upon the trusts and subject to the terms and conditions set forth in this indenture, of the following described real estate situate in the City of Fort Worth, State of Texas, for use as terminal property and facilities, to wit:

\$250,000 of
bonds for
terminal
property at
Fort Worth.

All that part of Block No. 91 of Terry's Subdivision bounded on the west by Terry Street, on the north by East Fifth Street, on the east by that part of Elm Street between East Fifth and Sixth Streets, as originally platted, and on the south by East Sixth Street, as originally platted.

All that part of Block No. 90 of Terry's Subdivision bounded on the west by that portion of Elm Street lying between East Fifth and East

that portion of Crump Street lying between East Fifth and East Sixth Streets, as originally platted, and on the south by East Sixth Street as originally platted.

Also that portion of Block No. 90 of Terry's Subdivision bounded on the north by East Fifth Street, on the west by that portion of Crump Street lying between East Fifth and East Sixth Streets, as originally platted, on the south by East Sixth Street, as originally platted, and on the east by the east boundary line of said block No. 90, adjoining Block No. 2 of the More-Thornton Company strips.

All that portion of Block No. 2 of the More-Thornton Company strips bounded on the north by East Fifth Street, on the west by the west boundary line of Terry's Subdivision of Block No. 90, on the south by East Sixth Street, as originally platted, and on the east by Harding Street, as originally platted, with the exception of Lot No. 5, of said Block No. 2, of the More-Thornton & Company strips, fronting about twenty-five feet east of what was formerly known as Harding Street, as originally platted, and bounded on the north by East Fifth Street.

All that part of Sixth Street in the City of Ft. Worth, Texas, which lies east of its intersection with the east line of Terry Street to the Eastern extremity of said Sixth Street, and all those parts and portions of Elm Street, Crump Street and Harding Street, and what is known as Dunn's Alley, which extends or lies south of the south boundary line of Fifth Street and the north line of Sixth Street; which property was formerly embraced in the property of the streets above described which streets were closed and vacated by an ordinance passed by the City Council of the City of Ft. Worth, Tex., on the 12th day of November, 1906, and is recorded in Ordinance Book E, page 177, on November 16th, 1906.

shall be authenticated by the Trust Company and delivered to the grantor or grantors named in said deed of conveyance, or upon the written order of said grantor or grantors, said bonds in said amount of

One Hundred and Fifty Thousand Dollars (\$250,000),
 the amount thereof required in order to acquire
 a property.

The Railway Company shall furnish to the Trust
 Company the written opinion of counsel for the Rail-
 way Company, to the effect that said deeds of con-
 veyance to the Trustees, under this Section 3 and
 under Section 2 of this Article Second, are in all re-
 spects sufficient to convey the title to the premises, and
 the sections described, to the Trustees, free from all
 claims and encumbrances, and to subject the said
 premises to the lien of this indenture as a first lien
 thereon, and such opinion may be accepted by the
 Trustees as conclusive evidence of the facts therein
 stated and as full authority and protection to the
 Trust Company for its action on the faith thereof.

Opinion of
 counsel.

Section 4. Two million, one hundred and sixty-five
 Thousand Dollars (\$2,165,000), face amount, of First
 Terminal and Unifying Mortgage Bonds, or so many
 thereof as may be required, shall be reserved to be is-
 sued and delivered for the purpose of paying or ac-
 quitting by purchase, or otherwise, or of reimbursing
 the Railway Company for expenditures made by it
 prior to January 1, 1912, in the payment or acquisition
 of the following described equipment obligations of
 the Railway Company outstanding on January 1, 1912,
 being all of the equipment obligations of the fol-
 lowing series then outstanding:

\$2,165,000 of
 bonds for
 equipment
 obligations.

\$139,619.40, face amount, of equipment notes,
 Series C-21, issued under a conditional sale
 agreement between American Car and Foundry
 Company and St. Louis Southwestern Railway
 Company, dated June 7, 1909.

\$76,731.84, face amount, of equipment notes,
 Series C-22, issued under a conditional sale
 agreement between American Car and Foundry
 Company and St. Louis Southwestern Railway
 Company, dated August 13, 1909.

\$276,495, face amount, of equipment notes,
 Series H-1, issued under a conditional sale
 agreement between Burnham, Williams & Co.
 and St. Louis Southwestern Railway Company,
 dated February 20, 1907.

\$1,672,000, face amount, of equipment notes,
 Series B, issued under a conditional sale agree-

ment between Bankers' Trust Company and St. Louis Southwestern Railway Company, dated January 20, 1911.

Whenever the Railway Company shall deliver, or shall cause to be delivered, to the Trust Company any of the above described equipment obligations of the Railway Company now outstanding, together with any unmatured interest coupons thereto belonging, the Trust Company shall receive the same, and, in exchange therefor, shall authenticate and deliver to the Railway Company, or upon its order, bonds secured by this indenture and reserved under this Section 4 in a face amount equal to the face amount of the equipment obligations so received by the Trust Company.

All equipment obligations, with all unmatured coupons thereto belonging, shall, on or prior to the delivery thereof to the Trust Company, be canceled.

Section 5. Four hundred thousand Dollars (\$400,000), face amount, of First Terminal and Unifying Mortgage Bonds shall be reserved to be issued and delivered for the purpose of securing, by purchase or exchange or otherwise, a like face amount of First Refunding and Extension Mortgage Bonds of the Gray's Point Terminal Railway Company issued under the First Refunding and Extension Mortgage of said last-mentioned Railway Company to Bowling Green Trust Company (now The Equitable Trust Company of New York) and S. W. Fordyce, as trustees, dated August 1, 1906, to secure an authorized issue of \$4,000,000, face amount, of said bonds.

Whenever the Railway Company shall deliver or shall cause to be delivered to the Trust Company any of said First Refunding and Extension Mortgage Bonds of the Gray's Point Terminal Railway Company up to the aggregate face amount of \$400,000 thereof, with all unmatured coupons thereto annexed, in the case of coupon bonds, the Trust Company shall receive and hold the same, and, in exchange therefor, shall authenticate and deliver to the Railway Company, or upon its order, bonds secured by this indenture and reserved under this Section 5 in a face amount equal to the face amount of said First Refunding and Extension Mortgage Bonds of Gray's Point Terminal Railway Company so received by the Trust Company.

Section 6. Thirty-eight million five hundred thousand Dollars (\$38,500,000), face amount, of First Terminal and Unifying Mortgage Bonds shall be reserved to be issued and delivered for the purpose of refunding, purchasing, taking up or paying, at, before or after maturity, the following bonds, which are hereafter called collectively the "underlying bonds," to wit:

\$38,500,000 of bonds to refund underlying bonds.

(a) \$25,000,000, face amount, of First Consolidated Mortgage Bonds of the Railway Company, maturing June 1, 1932, the same being the total authorized issue thereof, secured by the First Consolidated Mortgage of said Railway Company, dated June 1, 1902, to Bowling Green Trust Company (now The Equitable Trust Company of New York), and David R. Francis, as trustees.

(b) \$500,000, face amount, of First Mortgage Bonds of Gray's Point Terminal Railway Company, maturing December 1, 1947, the same being the total authorized issue thereof, secured by the First Mortgage of said Terminal Company, dated December 1, 1897, to St. Louis Trust Company as trustee.

(c) \$3,000,000, face amount, of First Mortgage Bonds of The Central Arkansas and Eastern Railroad Company, maturing July 1, 1940, the same being the total authorized issue thereof, secured by the First Mortgage of said Railway Company, dated July 1, 1910, to St. Louis Union Trust Company as trustee.

(d) \$10,000,000, face amount, of First Mortgage Bonds of Stephenville North & South Texas Railway Company, maturing July 1, 1940, the same being the total authorized issue thereof, secured by the First Mortgage of said Railway Company, dated July 1, 1910, to Commonwealth Trust Company as trustee.

Whenever the Railway Company shall deliver or shall cause to be delivered to the Trust Company, in bearer form or accompanied by proper instruments of assignment and transfer, and whether at, before or after the maturity thereof, any of the said "underlying bonds" then outstanding, with all coupons, if any, thereto belonging and unmatured at the time of

Issue of bonds in exchange for underlying bonds.

such delivery, the Trust Company shall receive the same and, in exchange therefor (except in the case of payment by the Trust Company of cash deposited as hereinafter provided), shall authenticate and deliver to the Railway Company, or upon its order, First Terminal and Unifying Mortgage Bonds in a face amount equal to the face amount of the "underlying bonds" so received by the Trust Company.

Underlying bonds to be held alive and uncanceled by Trust Company until all are received.

All "underlying bonds," with all unmatured coupons thereto belonging, received by the Trust Company as aforesaid, shall be held by it alive and uncanceled as a part of the security for the First Terminal and Unifying Mortgage Bonds issued and outstanding under this indenture, until all "underlying bonds" of the same series or issue have been so received by the Trust Company.

Cancellation and surrender of underlying bonds.

Whenever all "underlying bonds" of any series or issue shall have been paid or canceled or delivered to the Trust Company hereunder, the Railway Company will cause the mortgage securing said "underlying bonds," so canceled, paid or delivered to the Trust Company, to be satisfied and discharged, and the Trust Company will, upon the written request of the Railway Company and for the purpose of securing the satisfaction and discharge of any such mortgage, cancel and surrender all of the "underlying bonds" so held by it. Upon the satisfaction and discharge of any such mortgage the Railway Company will transfer and deliver to the Trust Company all shares of stock, bonds or other obligations then held undisposed of by the trustee of any mortgage so satisfied and discharged, to be held by the Trust Company upon the trusts and for the purposes in this indenture declared and as a part of the mortgaged premises.

Sale of bonds to acquire underlying bonds.

At any time or times at or after the maturity of any "underlying bonds," or within twelve months before such maturity, the Railway Company may sell First Terminal and Unifying Mortgage Bonds reserved under this Section 6, in order to provide, in whole or in part, the means to pay or purchase any of the "underlying bonds" so matured or maturing which shall not theretofore have been delivered to the Trust Company and be held hereunder; and the Trust Company shall authenticate and deliver to the Railway Company, or upon its order, First Terminal

and Unifying Mortgage Bonds in a face amount equal to the face amount of the "underlying bonds" to be paid or purchased as aforesaid, provided that an amount of money equal to the face amount of the said "underlying bonds," so to be paid or purchased, together with the accrued interest thereon, shall simultaneously be deposited with the Trust Company. Out of the moneys so received by the Trust Company it shall, on demand of the Railway Company and upon delivery to the Trust Company of the "underlying bonds," so paid or purchased by the Railway Company, in bearer form or accompanied by proper instruments of assignment and transfer, pay to the Railway Company, or upon its order, a sum equal to the face amount of such "underlying bonds" so paid or purchased, and also the accrued interest thereon deposited with the Trust Company as aforesaid. A certificate, signed or purporting to be signed by the President or a Vice-President and by the Treasurer or an Assistant Treasurer of the Railway Company under its corporate seal, as to any facts appertaining to the right to authenticate and deliver the First Terminal and Unifying Mortgage Bonds under this Section 6, or to pay over their proceeds as aforesaid, may be accepted by the Trust Company as conclusive evidence of such facts and as full authority and protection to the Trust Company for its action on the faith thereof.

Certificate to
protect Trust
Company.

Section 7. Fifty-four million Dollars (\$54,000,000), face amount, of First Terminal and Unifying Mortgage Bonds; being the remainder of said bonds authorized to be issued under this indenture, shall be authenticated and delivered by the Trust Company from time to time for one or more of the purposes mentioned in Section 8 of this Article, but subject to the restrictions therein provided, or for one or more of the purposes mentioned in Section 9 of this Article, but subject to the restrictions therein provided; provided, however, that the bonds reserved under this Section 7 shall not be authenticated and delivered, for the purposes mentioned in paragraphs (a), (b), (c), (d) and (e) of Section 8 of this Article, at a greater cumulative annual rate for each calendar year beginning January 1, 1912, and ending December 31, 1921, than \$2,000,000, face amount, of said bonds, and at a greater cumulative annual rate for each calendar year beginning January 1, 1922, and

\$54,000,000
of bonds
reserved;
purposes.

Restrictions
as to issue.

ending December 31, 1951, than \$3,000,000, face amount, of said bonds, and for the purposes mentioned in paragraph (f) of Section 8 of this Article not exceeding in the aggregate \$800,000, face amount, of said bonds, for the calendar year beginning January 1, 1912, and not at a greater cumulative annual rate for each calendar year beginning January 1, 1913, and ending December 31, 1951, than \$500,000, face amount, of said bonds; but any portion of said bonds, at the rates aforesaid, which shall not be authenticated and delivered in any calendar year, may be authenticated and delivered at any time thereafter in addition to the bonds which may be authenticated and delivered in any subsequent year.

Bonds reserved
under Section 7
issuable for:

Section 8. The First Terminal and Unifying Mortgage Bonds reserved under the provisions of Section 7 of this Article may, from time to time, be authenticated and delivered by the Trust Company to the Railway Company, or upon its order, as provided in this Section 8, but subject to the restrictions hereinafter in this Section 8 provided, and only for some one or more of the following purposes, to wit:

(a) Improve-
ments and
betterments.

(a) The construction, reconstruction and improvement, after January 1, 1912, of tunnels, trestles and bridges, ballasting of tracks, the widening of cuts and fills, the construction of block and other signals, the reduction of grades and curvature, the construction, reconstruction, and improvement of telegraph and telephone lines, machinery, additional side tracks, spur tracks or passing tracks, the purchase of heavier rails, additional or improved track fastenings and appurtenances and improved frogs or switches, and other additions, improvements and permanent betterments upon, along or appertaining to, or for use in connection with, any lines of railroad at the time owned by the Railway Company and which shall be subject to this indenture, or which at the time of such construction or acquisition shall be leased by the Railway Company for a term expiring subsequent to January 1, 1952, and the leasehold interest of the Railway Company in which shall be subject to this indenture, or shall be owned or shall be leased for a term expiring subsequent to January 1, 1952,

by any other company all of whose capital stock (except qualifying shares) shall be owned by the Railway Company and assigned or pledged under this indenture or under any of its existing mortgages; or

(b) The construction or acquisition after January 1, 1912, by the Railway Company or by any other company, all of whose capital stock (except qualifying shares) shall be owned by the Railway Company and assigned or pledged under this indenture or under any of its existing mortgages, or by any other company whose lines of railroad, at the time of such construction or acquisition, shall be leased by the Railway Company for a term expiring subsequent to January 1, 1952, and the leasehold interest of the Railway Company in which shall be subject to this indenture, or by any other company all of whose railroads and property, at the time of such construction or acquisition, shall be leased for a term expiring subsequent to January 1, 1952, by any other company, all of whose capital stock (except qualifying shares) shall be owned by the Railway Company and assigned or pledged under this indenture or any of its existing mortgages, of additional main track or double-track passenger and freight stations, shops, roundhouses, warehouses, wharves, docks and other structures, terminals and terminal and station facilities and yards, the acquisition of any additional grounds and properties for terminal purposes, and the construction or erection on any grounds and properties so acquired of freight houses, warehouses or other improvements or terminal facilities, and the construction or acquisition of railroad bridges or transfer facilities across navigable waters.

(b) Construction or acquisition of additional track, structures and terminal facilities.

(c) The acquisition of all of the mortgage bonds, if any, and all of the shares of the capital stock (except qualifying shares) of any corporation or corporations owning any property of the character mentioned in the foregoing paragraph (b).

(c) Acquisition of bonds and stock of corporations.

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(d) Acquisition of \$2,450,000 bonds of Gray's Point Terminal Railway Company.

(d) The acquisition of all or any part of \$2,450,000, face amount, of First Refunding and Extension Mortgage Bonds of the Gray's Point Terminal Railway Company in addition to the \$400,000 face amount of said bonds, for which a like face amount of bonds secured by this indenture is reserved to be authenticated and delivered under the provisions of Section 5 of this Article Second, and, after the acquisition and deposit with the Trust Company of \$2,850,000, face amount, of First Refunding and Extension Mortgage Bonds of the Gray's Point Terminal Railway Company, the construction or acquisition by said company of any improvements, betterments, extensions or other property, of the character mentioned in the foregoing clauses (a) and (b) of this Section 8.

(e) Reimbursement of expenditures made for above purposes.

(e) To reimburse the Railway Company for any expenditures made or advanced by it, after January 1, 1912, for any of the aforesaid purposes.

(f) Construction or acquisition of rolling stock and equipment.

(f) The construction or acquisition of locomotives, cars and other rolling stock and equipment.

Restrictions:

The restrictions subject to which bonds shall from time to time be authenticated and delivered under this Section 8 are as follows:

—certified copy of resolution.

(1) Before authenticating and delivering bonds under the provisions of this Section 8, there shall be delivered to the Trust Company a certified copy of a resolution of the Board of Directors or Executive Committee of the Railway Company calling for the authentication and delivery of a specified amount of said bonds, and, unless required for reimbursement of the Railway Company in respect of previous expenditures or advances, directing the officers of the Railway Company to set aside said bonds or their proceeds, separate and apart from any other assets and funds of the Railway Company, and to use the same only for purposes authorized by this Section eight.

(2) In every instance, before authenticating or delivering any of the bonds under this Section 8, the Trust Company shall require the Railway Company to furnish, in addition to said certified copy of a resolution of its Board Directors or Executive Committee, a certificate or certificates, signed or purporting to be signed, first, by the President or a Vice-President, and, second, by the Auditor or Treasurer or Assistant Treasurer of the Railway Company under its corporate seal, stating:

—certificate
of officers.

(a) That specified amounts of money have been actually expended, or specified absolute money liabilities have been actually incurred after January 1, 1912, and within two years prior to the date of said certificate, for purposes authorized by this Section 8, or some one or more of them, indicating the particular property acquired or constructed or contracted for (specifying in the case of rolling stock and equipment the character, amount, distinguishing marking and numbering of each piece thereof), and whether acquired, constructed or contracted for by or on behalf of the Railway Company or any other and what other company, and briefly describing, as the case may be, the location of the passenger and freight stations, shops, warehouses, roundhouses, wharves, docks and other structures constructed, acquired or contracted for, or the location and character of the terminals and terminal and station facilities and yards constructed, acquired or contracted for, and the location of any real estate or other properties acquired or contracted for, or the amount or class of betterments and improvements made or contracted for, and specifying the amount of money used or applied for every such purpose.

(b) That the property acquired, constructed or contracted for is not known or believed to be subject to any lien or charge except undetermined liens or charges incident to construction, and except the liens of the mortgages securing the "underlying bonds,"

or the liens of other existing mortgages of the Railway Company, or some one or more of them, and except as otherwise specified in such certificate.

(c) That the price paid or liability incurred for such construction or acquisition was not in excess of the fair value and actual cash cost of the property acquired or contracted for, or work done or to be done, and that no part thereof has been included in any previous certificate made under any provisions of this indenture, or has been reimbursed to the Railway Company out of moneys or bonds received from the Trust Company under any of the provisions of this indenture or any other mortgage of the Railway Company constituting a lien upon the premises.

(d) In case of the acquisition of capital stock or bonds or other indebtedness of other corporations such certificate shall state the actual amount of money expended or of obligation incurred by the Railway Company in the acquisition of such stock or bonds or other indebtedness except that in the case of the acquisition of First Refunding and Extension Mortgage Bonds of the Gray's Point Terminal Railway Company said certificate shall state the face amount of said bonds so acquired, and in the case of shares of stock of any depot, terminal or transfer company, or other company having the right to furnish to the Railway Company station, terminal and transfer facilities, shall also state that the Railway Company has the right to use the facilities of such depot, terminal or transfer company.

(e) That the amounts so expended or liabilities so incurred have not been charged, in any annual report of the Railway Company or other company making such expenditures or incurring such liabilities, or in any report made by the Railway Company or any such other company to the Interstate Commerce Commission, to operating expenses or the expense of maintenance, and that such expendi-

tures or liabilities are properly chargeable, under the rules and regulations prescribed by the Interstate Commerce Commission, to capital account.

Any such certificate under this Section 8 may also state any other facts pertaining to the right to authenticate or deliver bonds hereunder.

—stocks and bonds acquired to be delivered to Trust Company and subjected to lien hereof.

In the case of the acquisition of capital stock or bonds of other corporations there shall be delivered to the Trust Company all bonds so acquired and also all certificates representing shares of stock so acquired, properly assigned in blank for transfer; and the Railway Company shall execute, or shall cause to be executed, any conveyances or instruments of further assurance that may be necessary for the purpose of effectually subjecting to the lien and operation of this indenture any such shares of stock or bonds so acquired by it.

The Railway Company shall also execute, or shall cause to be executed, any conveyances or instruments of further assurance that may be necessary for the purpose of effectually subjecting to the lien and operation of this indenture any new property acquired by the Railway Company by the use of the bonds secured by this indenture or the proceeds of said bonds, but, in the case of the use of said bonds or their proceeds in the purchase or acquisition of locomotives, cars and other rolling stock and equipment, the Railway Company shall cause the title to said rolling stock and equipment to be conveyed to the Trustees of this indenture, upon the trusts and subject to the provisions hereof, or to be otherwise subjected to the lien of this indenture as a first lien thereon.

—instruments of conveyance.

Upon receipt by the Trust Company of the resolutions, statements and certificates under the foregoing provisions of this section, the Trust Company shall authenticate and deliver to the Railway Company, or upon its order, a principal amount of bonds reserved under this Section 8 of this Article within the limitations prescribed in Section 7 of this Article equal to the amount of expenditures and liabilities or the face amount of said First Refunding and Extension Mortgage Bonds of the Gray's Point Terminal Railway Company stated in said certificates; and such resolutions, statements and certificates, respec-

—authentication and delivery of bonds to cover expenditures.

tively, may be accepted by the Trust Company as conclusive evidence of the facts therein referred to and as full authority and protection to the Trust Company for its action on the faith thereof.

Bonds reserved
under Section 7
issuable for:

Section 9. The First Terminal and Unifying Mortgage Bonds reserved under the provisions of Section 7 of this Article may, from time to time, be authenticated and delivered by the Trust Company to the Railway Company, or upon its order, as provided in this Section 9, but subject to the restrictions hereinafter in this Section 9 provided, and only, for some one or more of the following purposes, to wit:

(a) Construction or acquisition of extensions or branches; acquisition of bonds and stock of corporations owning extensions and branches.

(a) The construction or acquisition, after January 1, 1912, by the Railway Company, free from all liens or encumbrances save only the lien of this indenture, or the construction or acquisition, after January 1, 1912, by any other company all of whose capital stock (except qualifying shares) and all of whose mortgage bonds, if any, shall be owned by the Railway Company and pledged under this indenture and held by the Trust Company hereunder, of lines of railroad constituting extensions or branches of the lines of railroad owned by the Railway Company and subject to this indenture, or owned by any other company or companies all of whose capital stock (except qualifying shares) shall be owned by the Railway Company and assigned or pledged under this indenture or under any of its existing mortgages, or the acquisition of all the mortgage bonds, if any, and all of the shares of the capital stock (except qualifying shares) of any corporation or corporations owning any such extension or branch.

(b) Reimbursement of expenditures made for above purposes.

(b) To reimburse the Railway Company for any expenditures made or advanced by it for any of the aforesaid purposes subsequent to January 1, 1912.

Restrictions:

The restrictions subject to which bonds shall, from time to time, be authenticated and delivered under this Section 9 are as follows:

—certified copy
of rescission.

1. Before authenticating and delivering bonds under the provisions of this Section 9 there shall be delivered to the Trust Company a certified copy of a

resolution of the Board of Directors or Executive Committee of the Railway Company calling for the authentication and delivery of a specified amount of said bonds, and, unless required for reimbursement of the Railway Company in respect of previous expenditures or advances, directing the officers of the Railway Company to set aside such bonds or their proceeds, separate and apart from any other assets of the Railway Company and to use the same only for the purposes authorized by this Section 9.

2. In every instance, before authenticating or delivering any of the bonds under this Section 9, the Trust Company shall require the Railway Company to furnish, in addition to said certified copy of a resolution of its Board of Directors or Executive Committee, a certificate or certificates signed or purporting to be signed, first, by the President or a Vice-President and, second, by the Auditor or Treasurer or Assistant Treasurer of the Railway Company under its corporate seal stating:

—certificate of
officers.

(a) That specified amounts of money have been actually expended, or specified absolute money liabilities have been actually incurred after January 1, 1912, and within two years prior to the date of said certificate, for purposes authorized by this Section 9, or for some one or more of them, briefly describing, as the case may be, the mileage and termini of any lines of railroad so constructed or acquired or contracted for, or the mortgage bonds and shares of capital stock of any corporation or corporations so acquired or contracted for, and a brief description of the lines of railroad owned by any such corporation or corporations, and specifying the amount of money used or applied for every such purpose or the amount of absolute money liability incurred for every such purpose.

(b) If the property so constructed or acquired or contracted for, forming the subject of such certificate, be a line or lines of railroad, that such property is not known or believed to be subject to any lien or charge except undetermined liens or charges incident to construction.

(c) If the property so acquired or contracted for, forming the subject of such certificate, be the mortgage bonds or shares of capital stock, or both, of any corporation or corporations, that such bonds or stock, or both, are all of the mortgage bonds, if any, and all of the capital stock (except qualifying shares) of such corporation issued and outstanding.

(d) That the price paid or liability incurred for such construction or acquisition was not in excess of the fair value and actual cash cost of the property acquired or contracted for, or work done or to be done, and that no part thereof has been included in any previous certificate made under any provision of this indenture or has been reimbursed to the Railway Company out of moneys or bonds received from the Trust Company under any provisions of this indenture or of any other mortgage of the Railway Company constituting a lien upon the premises.

(e) In case of the acquisition of the capital stock or bonds of other corporations, such certificate shall state the actual amount of money expended or of obligation incurred in the acquisition of such stock or bonds.

(f) That the amounts so expended or liabilities so incurred have not been charged in any annual report of the Railway Company or other company making such expenditures or incurring such liabilities, or in any report made by the Railway Company or any such other company to the Interstate Commerce Commission, to operating expenses or the expense of maintenance; and that such expenditures or liabilities are properly chargeable, under the rules and regulations prescribed by the Interstate Commerce Commission, to capital account.

Any such certificate under this Section 9 may also state any other facts pertaining to the right to authenticate or deliver bonds hereunder.

In the case of the acquisition of capital stock or bonds of other corporations there shall be delivered to the Trust Company all bonds so acquired and also

—stock and bonds acquired to be delivered to Trust Company and subjected to lien hereof.

all certificates representing shares of stock so acquired; properly assigned in blank for transfer; and the Railway Company shall execute or shall cause to be executed any conveyances or instruments of further assurance that may be necessary for the purpose of effectually subjecting to the lien and operation of this indenture any such shares of stock or bonds so acquired by it.

The Railway Company covenants forthwith, upon the acquisition or construction thereof by it, to execute or cause to be executed any conveyance or instrument of further assurance that may be necessary for the purpose of effectually subjecting to the lien and operation of this indenture, as a first lien, any extension or additional lines of railway so constructed or acquired by the Railway Company, and shall furnish to the Trust Company the written opinion of counsel of the Railway Company to the effect that such conveyances or other instruments are sufficient for such purpose, or that no conveyance or instrument of further assurance is necessary for the purposes aforesaid, and also the written opinion of counsel of the Railway Company to the effect that any such new property so acquired can be lawfully acquired by the Railway Company and be subjected to the lien hereof as a first lien thereon.

—Instruments
of conveyance.

—opinion of
counsel.

Upon receipt by the Trust Company of the resolutions, statements, certificates and opinion under the foregoing provisions of this section, the Trust Company shall authenticate and deliver to the Railway Company, or upon its order, a principal amount of bonds reserved under this Section 9 of this Article equal to the amount of expenditures and liabilities stated in said certificate or certificates; and such resolutions, statements, certificates and opinion, respectively, may be accepted by the Trust Company as conclusive evidence of the facts therein referred to and as full authority and protection to the Trust Company for its action on the faith thereof.

—authenti-
cation and
delivery of
bonds to cover
expenditures.

Section 10. All bonds of other corporations which shall be acquired and which shall be delivered to the Trust Company under the foregoing Sections 8 and 9 of this Article Second, with all unmatured coupons thereto belonging, shall be held by the Trust Company alive and uncanceled as a part of the security for

Bonds of other
corporations to
be held by
Trust Company.

the First Terminal and Unifying Mortgage Bonds issued and outstanding under this indenture.

Orders for the purpose of obtaining authentication and delivery of bonds.

Section 11. Whenever the terms of any section of this Article require an order from the Railway Company to be delivered to the Trust Company for the purpose of obtaining the authentication and delivery of First Terminal and Unifying Bonds, such order shall be sufficient if signed or purporting to be signed on behalf of the Railway Company under its corporate seal by its President or a Vice-President or by some other officer of the Railway Company appointed for the purpose, and also by its Secretary or an Assistant Secretary or its Treasurer or an Assistant Treasurer, and if it shall state the principal amount of bonds to be delivered, the section of this Article under which such bonds are included, and the person or persons to whom, or the firm or corporation to which, such bonds are to be delivered.

Trust Company entitled to rely on certified copies of instruments.

Section 12. Except as and when this indenture otherwise expressly provided, the Trust Company shall be entitled to act and rely upon any copy of resolution, certificate, order, request, direction, or other instrument, by any provision of this indenture required or provided to be delivered by the Railway Company to the Trust Company when the same is certified or signed by the Secretary or an Assistant Secretary of the Railway Company under its corporate seal, and shall be fully protected in respect of any and all acts done or action taken or suffered by it, or in its behalf, in reliance thereon; and every such copy of resolution, certificate, order, request, direction or other instrument, thus certified and executed, shall be, at all times and in all places, conclusively taken and held to be the act and deed of, and binding upon, the Railway Company.

Trust Company not bound to see to application of bonds.

Section 13. The Trust Company shall not be bound to see to, nor be responsible for, the use and application of any bonds which shall be delivered by it to the Railway Company, or upon its order, under any of the provisions of this Article Second, or of the proceeds thereof.

PARTICULAR COVENANTS OF RAILWAY COMPANY.

Article Third.

The Railway Company covenants with the Trustees as hereinafter in this Article set forth:

Section 1. The Railway Company will duly and punctually pay the principal and the interest of every bond issued under this indenture, at the dates and the places and in the manner mentioned in such bonds or in the coupons thereto belonging, according to the true intent and meaning thereof, without deduction from either principal or interest for any tax or governmental charge which the Railway Company or the Trustees, or either of them, may be required or permitted to pay, or to retain therefrom, under or by reason of any present or future law of the United States, or of any state, territory, county, municipality or other taxing authority therein, the payment of which tax or charge the Railway Company hereby assumes. The interest on the coupon bonds shall be payable only upon presentation and surrender of the several coupons for such interest as they respectively mature, and, when paid, such coupons shall forthwith be canceled. The interest on the registered bonds without coupons shall be payable only to the registered holders thereof.

Covenant to pay principal and interest, without deduction for taxes.

In order to prevent any accumulation of coupons and claims for interest after maturity, the Railway Company will not, directly or indirectly, extend, or assent to the extension of, the time for the payment of any coupon or claim for interest on any of the First Terminal and Unifying Mortgage Bonds; and the Railway Company will not, directly or indirectly, be a party to or approve of any such arrangement by purchasing or funding said coupons or claims for interest or in any other manner. No purchase of any coupon or any advance or loan thereon by or on behalf of the Railway Company or by or on behalf of any person or corporation which, by agreement with the Railway Company, shall become obligated to the payment of the same, shall keep such coupons alive or preserve their lien upon the trust estate except after the prior payment in full of the principal of all the First Terminal and Unifying Mortgage Bonds and of all coupons and claims for interest not so purchased or funded.

—not to extend time for payment of interest.

At all times until the payment of the First Terminal and Unifying Mortgage Bonds, the Railway Company will keep an office or agency in the Borough of Manhattan, in the City of New York, where the First Terminal and Unifying Mortgage Bonds and coupons

—to keep an office in New York for paying bonds and coupons.

may be presented for payment, and where notices and demands in respect of the First Terminal and Unifying Mortgage Bonds and coupons or under this indenture may be served, as to the Railway Company, and will, by written notice, designate such office or agency to the Trust Company, or will designate, by a written notice to the Trust Company, a bank or trust company in said Borough for such purposes. In default of any such office or agency or such designation thereof, presentation and demand may be made and notice served at the office, in said Borough of Manhattan, of the Trust Company or of any successor to it in the trust.

certain after-
quired
property
subject to
indenture.

Covenant for
urther
assurances.

Section 2. All railways, franchises and other property of every kind which hereafter may be at any time required by the Railway Company, in respect of the construction or acquisition whereof bonds under this indenture shall be authenticated and delivered as hereinbefore provided, and any of the "underlying bonds" specified in Section 6 of Article Second of this indenture which hereafter may be acquired by the Railway Company shall, immediately upon the acquisition thereof by the Railway Company and without any further conveyance or assignment become and be subject to the lien of this indenture as fully and completely as though now owned by the Railway Company and specifically described in the Granting Clause hereof; but at any and all times, the Railway Company will execute and deliver any and all such further assurances or conveyances or assignments thereof to the Trustees as the Trustees, or either of them, may reasonably direct or require, for the purpose of expressly and specifically subjecting the same to the lien of this indenture, and forthwith, on the acquisition of any of the "underlying bonds," will deliver the same to the Trust Company; and also the Railway Company will do, execute, acknowledge and deliver, or cause to be done, executed, acknowledged and delivered, all and every such further acts, deeds, conveyances, transfers and assurances in the law, for the better assuring, conveying, assigning and confirming unto the Trustees all and singular the hereditaments and premises, estates and property by this indenture conveyed or assigned, or intended so to be, or which the Railway Company may be or hereafter become bound to convey or assign to the Trustees,

as the Trustees, or either of them, shall reasonably require.

Section 3. The Railway Company owns and is lawfully possessed of the lines of railroad, equipment, franchises and property described in the Granting Clause of this indenture; and the Railway Company will warrant and defend the title thereof and every part thereof as well as of any lines of railroad, equipment and franchises or of other lands acquired by the Railway Company, to the Trustees, their successors in the trust and their assigns, for the benefit of the holders for the time being of the First Terminal and Unifying Mortgage Bonds, against the lawful claims and demands of all persons whomsoever.

--to warrant
and defend
title.

Subject only as stated in the Granting Clause, the mortgaged premises are free from any lien or charge prior to the lien of this indenture, and, subject only as in the Granting Clause stated or as elsewhere in this indenture expressly permitted, the lines of railroad, equipment, franchises and property from time to time subject to this indenture and constituting the mortgaged premises shall be kept free from any lien or charge prior to the lien of this indenture.

--as to priority
of lien.

The Railway Company will not voluntarily create, or suffer to be created, any debt, lien or charge which would be prior to the lien of this indenture upon the trust estate, or any part thereof, or upon the income thereof; and, within three months after the same shall accrue, it will pay or cause to be discharged, or will make adequate provision to satisfy and discharge, all lawful claims and demands of mechanics, laborers and others which, if unpaid, may by law be given precedence to this indenture as a lien or charge upon the trust estate or any part thereof, or the income thereof; provided, that nothing in this Section contained shall require the Railway Company to pay any such debt, lien or charge so long as it shall, in good faith, contest the validity thereof, unless thereby, in the opinion of the Trust Company, the trust estate or some part thereof will be lost, forfeited or materially endangered.

--not to create
any prior lien
upon trust
estate or
income.

--to discharge
all lawful
claims of
mechanics,
laborers and
others.

Section 4. The Railway Company from time to time will pay and discharge or cause to be paid and discharged, all taxes, assessments and governmental charges (the lien whereof would be prior to the lien hereof) lawfully imposed upon the trust estate or

--to pay taxes.

upon any part thereof, or upon the income and profits thereof, and also all taxes, assessments and governmental charges lawfully imposed upon the lien or interest of the Trustees in respect to such premises or income, so that the lien and priority of this indenture shall be fully preserved at the cost of the Railway Company without expense to the Trustees or the bondholders; provided, however, that the Railway Company shall have the right to contest any such tax, assessment or charge, and, pending such contest, may delay or defer the payment thereof, unless thereby, in the opinion of the Trust Company, the trust estate or some part thereof will be lost, forfeited or materially endangered.

—to furnish
Trust
Company lists
of equipment.

Section 5. The Railway Company shall and will forthwith file with the Trust Company a correct list of all locomotives, cars, rolling stock and other equipment covered by the conditional sale agreements securing the equipment notes specified in Section 4 of Article Second of this indenture, and the Railway Company shall and will also at all times keep on its books a separate list of all locomotives, cars, rolling stock and other equipment purchased or acquired through the use of the bonds secured by this indenture, or their proceeds, and subject to this indenture as a first lien thereon, and will furnish to the Trust Company a complete list of all such locomotives, cars, rolling stock and equipment as the same are so purchased or acquired, and from time to time will furnish to the Trust Company a corrected list thereof, so as to enable the Trust Company at all times to identify the locomotives, cars, rolling stock and other equipment upon which this indenture is a first lien.

—to maintain
mortgaged
equipment.

The Railway Company shall and will at all times keep and maintain in good order and condition, reasonable wear and tear excepted, all locomotives, cars, rolling stock and other equipment purchased or acquired through the use of bonds secured by this indenture, or the proceeds of said bonds, and upon which this indenture shall be or become a first lien; and whenever any such locomotives, cars, rolling stock or other equipment shall be worn out or be destroyed, the Railway Company shall and will promptly cause the same to be replaced by other locomotives, cars, rolling stock or equipment of at least equal value, so that at all times the value of such locomotives, cars, rolling stock and other equipment, on which this in-

indenture shall be a first lien, shall be fully kept up; and at all times the Railway Company will set apart, use and apply for that purpose so much of the net earnings of the property mortgaged and pledged hereunder as may be required for the maintenance and replacement of said equipment.

The Railway Company shall and will cause any and all locomotives, cars, rolling stock and other equipment which may be purchased or acquired by the use of the bonds secured by this indenture, or the proceeds of said bonds, and upon which this indenture shall be a first lien, to be clearly and distinctly marked, so as to be readily identified and to comply with the requirements of any and all laws requiring the marking of rolling stock and equipment, in order to assure and protect the lien of this indenture as a first lien thereon.

—to cause equipment to be marked for identification.

Section 6. The Railway Company shall and will, at all times, keep insured its rolling stock, tools and machinery, its buildings, and all other structures erected, or to be erected, on the mortgaged premises and all other property provided for use in connection with the railways and premises at any time subject to the lien of this indenture, and of the character usually insured by railway companies, and in the same manner, and to the same extent. The proceeds of any such insurance shall be set apart and held by the Railway Company and applied by it to the purchase of other property, real or personal, including rolling stock and equipment, which shall become subject to this indenture as a lien thereon, or in betterments of or in additions to the mortgaged premises. In the case of all property of any kind or nature whatsoever, including equipment, upon which this indenture is a first lien, the policies of insurance shall provide that in case of loss the insurance shall be paid to the Trust Company, and the policies shall be delivered to and be held by the Trust Company. Upon the payment to the Trust Company of any insurance money on account of losses covered by such insurance, such money until the replacement or repair of the property covered by such insurance or the purchase by the Railway Company of other property, as aforesaid; and upon the receipt by the Trust Company of a certificate, signed or purporting to be signed by the President, or a Vice-President and by the Auditor or Treasurer or Assistant Treasurer of the Railway Company, un-

—to insure.

der its corporate seal, setting forth that such insured property has been replaced by new or additional property, or repaired, or that other property has been purchased, as aforesaid, and the cost of such replacement, repair or purchase, stated with reasonable detail, and that such cost was reasonable and proper in amount, such insurance money, to the extent of such cost, shall be paid by the Trust Company to the Railway Company. Such certificate may be accepted by the Trust Company as conclusive evidence of the facts therein referred to and as full authority and protection to the Trust Company for its action on the faith thereof.

New property
subject to
indenture.

Any new property acquired by the Railway Company ipso facto shall become and be subject to this indenture as fully as though specifically mortgaged or assigned hereby, but, if requested by the Trust Company, the Railway Company will convey and assign the same to the Trust Company by appropriate deeds or other instruments upon the trusts and for the purposes of this indenture, and will cause the same to be recorded or filed in such manner as appropriately to secure and continue the lien of this indenture thereon.

Covenant to
maintain
franchises and
properties.

Section 7. The Railway Company shall and will diligently preserve all the rights and franchises to it granted and upon it conferred, and shall and will, at all times, maintain, preserve and keep the same, and every part thereof, and will, at all times, maintain, preserve and keep the rolling stock, fixtures and appurtenances, and every part and parcel thereof, in good repair, working order and condition, and will at all times keep the railways, premises and estate, from time to time subject to this indenture, supplied with all necessary motive power, rolling stock and equipment, and shall and will, from time to time, thereto make all needful and proper repairs, renewals and replacements.

At all times the Railway Company will keep and maintain in good order and condition, reasonable wear and tear excepted, all locomotives, tenders, cars and other equipment upon which this indenture shall be or become a lien, and whenever any such locomotives, tenders, cars or other equipment shall be worn out or be destroyed, the Railway Company promptly will cause the same to be replaced by other locomotives, tenders, cars or other equipment of at least

equal value, so that at all times the value of such locomotives, tenders, cars and other equipment upon which this indenture shall be a lien shall be fully kept up.

Section 8. The Railway Company faithfully and punctually will pay at maturity the principal of, and, as the same matures, the interest on, any bond or obligation or indebtedness of the Railway Company secured by lien or charge, however created, prior to that if this indenture on the mortgaged premises or any part thereof, and the Railway Company faithfully will observe and perform the covenants of any and every mortgage or deed or other instrument of trust or otherwise, securing any such bond or obligation which may constitute or create a lien or charge on any part of the mortgaged premises in priority to this indenture.

—not to default on underlying liens.

Section 9. Except as in this indenture expressly authorized, the Railway Company will not, by its affirmative vote or consent or by abstaining from voting, sanction or permit any increase of the bonded indebtedness or capital stock of any company all of whose capital stock (except qualifying shares) now are or hereafter shall be subject to this indenture, or the guaranty of any bonds of any such company or the creation of any mortgage or other lien upon the railroad or property of any such company, unless effective provision be made that such bonds and such mortgage or other lien and all such additional stock shall forthwith, upon the issue or creation thereof, be subjected to this indenture and be transferred to the trustee of the mortgage of the railway company under which the stock or bonds of any such company, theretofore issued, are held.

—except, as expressly authorized, not to increase bonded indebtedness or capital stock of companies all of whose stock is subject to this indenture.

The Railway Company further covenants and agrees that it will not, by its affirmative vote or consent, or by abstaining from voting, sanction or permit the extension of the time of payment of the principal of any of the "underlying bonds" mentioned in Section 6 of Article Second of this indenture, except for a period not in excess of two years from the respective dates of maturity of said "underlying bonds."

—not to extend time of payment of underlying bonds beyond two years after maturity thereof.

—not to dispose of railroad or property of companies all of whose capital stock is subject to this indenture.

Except as in this indenture expressly authorized, the Railway Company will not, by its affirmative vote or consent or by abstaining from voting, sanction or permit any company, all of whose capital stock (except qualifying shares) now is or hereafter shall be subject to this indenture, to sell or otherwise dispose of, or lease (unless such lease be upon the express condition that it shall terminate at the election of the Trust Company in the case of any event of default, as hereinafter in this indenture set forth any railroad belonging to such company or any property required for the operation thereof, except to the Railway Company or to some other company, all of whose capital stock (except qualifying shares) shall then be owned by the Railway Company and be subject to the lien of this indenture.

—not to issue, sell or dispose of bonds, nor to apply proceeds, except as provided herein.

Section 10. The Railway Company will not issue, negotiate, sell or dispose of any First Terminal and Unifying Mortgage Bonds in any manner other than in accordance with the provisions of this indenture and the agreements in that behalf herein contained and with the requirements of law; and in issuing, selling, negotiating or otherwise disposing of such bonds, from time to time, it will well and truly apply, or cause to be applied, the same, or the proceeds thereof, to and for the purposes herein prescribed, and to or for no other or different purpose.

REMEDIES OF TRUSTEES AND BONDHOLDERS.

Coupons separately transferred deferred in payment.

Article Fourth.

Section 1. Neither any coupon belonging to any First Terminal and Unifying Mortgage Bond, nor any claim for interest on any registered bond, which in any way, at or after maturity, shall have been transferred or pledged separate or apart from the bond to which it relates, shall, unless accompanied by such bond, be entitled, in case of a default hereunder, to any benefit of or from this indenture, except after the prior payment in full of the principal of all the bonds issued hereunder, and of all coupons and interest obligations not so transferred or pledged.

Events of default:

Section 2. If one or more of the following events, hereinafter called the events of default, shall happen, that is to say:

(a) default in payment of principal and interest.

(a) default shall be made in the payment of any installment of interest on any of the First Terminal and Unifying Mortgage Bonds when and as the same shall become payable, as

therein and herein expressed, and such default shall continue for the space of three months, or default shall be made in the payment of the principal of any of said bonds when the same shall become due and payable either by the terms thereof or by declaration or otherwise as herein provided;

(b) default shall be made in the observance or performance of any other of the covenants, conditions and agreements on the part of the Railway Company, its successors or assigns, in the First Terminal and Unifying Mortgage Bonds, or in this indenture contained, and such default shall continue for the space of three months after written notice from the Trust Company, specifying such default and requiring the same to be remedied;

(b) default in observance of other covenants.

(c) an order shall be made for the appointment of a receiver of the Railway Company or of the trust estate or of any part thereof in any action for the foreclosure or enforcement otherwise of this indenture, or in any action for the foreclosure or enforcement otherwise of any lien or charge on the trust estate or on any part thereof in priority to the lien of this indenture; or, an order having been made for the appointment of a receiver of the Railway Company or of the trust estate, or of some part thereof, in any action or proceeding other than as aforesaid, default shall be made in the payment of any installment of interest on any of the First Terminal and Unifying Mortgage Bonds when and as the same shall become payable, as therein and herein expressed;

(c) appointment of receiver.

(d) default shall be made in the punctual payment of the interest, as such interest matures, on any bond or obligation secured by any lien prior to that of this indenture on the mortgaged premises or any part thereof, or the Railway Company shall fail, on the maturity of said bonds or obligations and on presentation thereof in accordance with the terms thereof, either to pay said bonds or obligations or to cause said bonds and obligations to be taken up and delivered to the Trust Company to be held under this indenture; or default shall be made

(d) default in payment of underlying obligations.

in the performance of any covenant contained in any mortgage or deed or other instrument of trust or otherwise, securing any such bond or obligation constituting a lien on any part of the mortgaged premises in priority to this indenture and by reason of such default any right of entry or of action for the enforcement of the security afforded thereby shall accrue;

Trust
Company's
right of entry
on default.

then and in each and every such case the Trust Company, one of the Trustees hereunder, personally, or by its agents or attorneys, may enter into and upon all or any part of the railways, rolling stock, property and premises, lands, rights, interests and franchises hereby conveyed or intended so to be, constituting the mortgaged premises and the trust estate, and each and every part thereof, and may exclude the Railway Company, its agents and servants, wholly therefrom; and, having and holding the same, may use, operate, manage and control said railways and other premises, regulate the tolls for the transportation of passengers and freight thereon, and conduct the business thereof, either personally or by its superintendents, managers, receivers, agents and servants or attorneys; and upon every such entry the Trust Company, at the expense of the trust estate, from time to time, either by purchase, repairs or construction, may maintain and restore and may insure or keep insured the rolling stock, tools and machinery and other property, buildings, bridges and structures erected or provided for use in connection with said railways and other premises, whereof it shall become possessed, as aforesaid, in the same manner and to the same extent as is usual with railway companies; and likewise, from time to time, at the expense of the trust estate, may make all necessary or proper repairs, renewals and replacements, and useful alterations, additions, betterments and improvements thereto and thereon, as to it may seem judicious; and in such case the Trust Company shall have the right to manage the mortgaged railways and property and to carry on the business and exercise all rights and powers of the Railway Company, either in the name of the Railway Company or otherwise, as the Trust Company shall deem best. And the Trust Company shall be entitled to collect and receive all tolls, earnings, rents, issues and profits of the same and every part thereof. And after deducting the expenses of operating said railways and other premises, and of

Application
of income:

conducting the business thereof and of all repairs, maintenance, renewals, replacements, alterations, additions, betterments and improvements, and all payments which may be made for taxes, assessments, insurance, and prior or other proper charges upon the trust estate, or any part thereof, as well as just and reasonable compensation for its own services and for all agents, clerks, servants and other employes by it properly engaged and employed, the Trust Company shall apply the moneys arising as aforesaid, as follows:

(a) In case the principal of the First Terminal and Unifying Mortgage Bonds shall not have become due, to the payment of the interest in default in the order of the maturity of the installments of such interest, with interest thereon at the rate of five (5) per centum per annum, such payments to be made ratably to the persons entitled thereto, without discrimination or preference;

—If principal not due.

(b) In case the principal of the First Terminal and Unifying Mortgage Bonds shall have become due, by declaration or otherwise, first to the payment of the accrued interest, with interest on the overdue installments thereof at the rate of five (5) per centum per annum, in the order of the maturity of the installments, and next to the payment of the principal of all the First Terminal and Unifying Mortgage Bonds; in every instance such payments to be made ratably to the persons entitled to such payments, without any discrimination or preference.

—If principal due.

These provisions, however, are not intended in any wise to modify the provisions of Section 1 of this Article Four of Section 1 of Article Third, but are subject thereto.

Section 3. If one or more of the events of default shall have happened, then and in every such case, unless the principal of the First Terminal and Unifying Mortgage Bonds shall already have become due, the Trust Company, by notice in writing delivered to the Railway Company, may, and, upon the written request of the holders of twenty-five per cent. in amount of the First Terminal and Unifying Mortgage Bonds then outstanding, shall declare the principal of all the First

Trust Company may declare principal due.

Waiver of
declaration
of maturity by
bondholders.

Terminal and Unifying Mortgage Bonds then outstanding to be due and payable immediately, and upon any such declaration the same shall become and be immediately due and payable; anything in this indenture or in said bonds contained to the contrary notwithstanding. This provision, however, is subject to the condition that if, at any time after the principal of said bonds shall have been so declared due and payable, and before any sale of the trust estate shall have been made, all arrears of interest upon all the First Terminal and Unifying Mortgage Bonds then outstanding, with interest on overdue installments of interest at the rate of five (5) per centum per annum, together with the reasonable charges and expenses of the Trust Company, its agents and attorneys, shall either be paid by the Railway Company or be collected out of the trust estate, and all other defaults under the First Terminal and Unifying Mortgage Bonds or under this indenture shall be made good to the satisfaction of the Trust Company, then and in such case the holders of a majority in amount of the First Terminal and Unifying Mortgage Bonds then outstanding, by written notice to the Railway Company and to the Trust Company, may waive such default and its consequences; but no such waiver shall extend to or affect any subsequent default or impair any right consequent thereon. In case the Trust Company shall have proceeded to enforce any right under this indenture by foreclosure, entry or otherwise, and such proceedings shall have been discontinued or abandoned because of such waiver, or for any other reason, or shall have been determined adversely to the Trust Company, then and in every such case the Railway Company and the Trust Company shall be restored to their former position and rights hereunder in respect of the trust estate, and all rights, remedies and powers of the Trust Company shall continue as though no such proceeding had been taken.

Trust
Company's
rights on
default:

Section 4. If one or more of the events of default shall happen, the Trust Company, with or without entry, personally or by attorney, in its discretion, either

(a) to sell
mortgaged
premises.

(a) may sell subject to the then prior existing liens thereon, to the highest and best bidder, all and singular the trust estate under this indenture, including securities, rights, fran-

chises, interests and appurtenances, and other real and personal property of every kind, and all right, title and interest, claim and demand therein, and right of redemption thereof; such sale or sales shall be made at public auction at such place in the City of Pine Bluff, in the State of Arkansas, or at such other place or places upon the mortgaged railroads, and at such time or times, and upon such terms as the Trust Company in its discretion may fix and briefly specify in the notice of sale to be given as herein provided, or as may be required by law; or

(b) may proceed to protect and to enforce its rights and the rights of bondholders under this indenture, by a suit or suits in equity or at law, whether for the specific performance of any covenant or agreement contained herein, or in aid of the execution of any power herein granted, or for any foreclosure hereunder, or for the enforcement of any other appropriate legal or equitable remedy, as the Trust Company, being advised by counsel learned in the law, shall deem most effectual to protect and enforce any of its rights or duties hereunder or the rights of the holders of the First Terminal and Unifying Mortgage Bonds.

(b) to institute judicial proceedings.

Section 5. Upon the written request of the holders of fifteen per cent. in amount of the First Terminal and Unifying Mortgage Bonds then outstanding, in case one or more of the events of default shall happen, it shall be the duty of the Trust Company, upon being indemnified as hereinafter provided, to take all steps needful for the protection and enforcement of its rights and the rights of the holders of the First Terminal and Unifying Mortgage Bonds, and to exercise the right of entry or of sale herein conferred, or both, or to take appropriate judicial proceedings by action, suit or otherwise, as the Trust Company, being advised by counsel learned in the law, shall deem most expedient in the interest of the holders of the First Terminal and Unifying Mortgage Bonds.

Trust Company to act on written request of bondholders.

Section 6. In the event of any sale, whether made under the power of sale herein granted or conferred, or under or by virtue of judicial proceedings, the whole of the property subject to this indenture shall be sold in one parcel and as an entirety, including all the

Sale of mortgaged premises to be as an entirety—

rights, title, estates, railways, equipment, franchises, leases, leasehold interests, contracts, securities and other real and personal property of every name and nature, unless such sale as an entirety is impracticable by reason of some statute or other cause, or unless the holders of a majority in amount of the First Terminal and Unifying Mortgage Bonds then outstanding shall in writing request the Trust Company to cause said premises to be sold in parcels, in which case, unless prevented by statute or other cause, the sale shall be made in such parcels, and in such order as may be specified in such request. The Railway Company, for itself and all persons and corporations hereafter claiming through or under it or who may at any time hereafter become holders of liens junior to the lien of this indenture, hereby expressly waives and releases all right to have the properties and estates comprised in the security intended to be created by this indenture marshaled upon any foreclosure or other enforcement hereof, and the Trust Company, or any court in which the foreclosure of this indenture or administration of the trusts hereby created is sought, shall have the right as aforesaid to sell the entire property of every description comprised in or subject to the trusts created by this indenture as a whole in a single lot.

—unless impracticable or majority of bondholders request otherwise.

Notice of sale.

Section 7. Notice of any sale pursuant to any provision of this indenture shall state the time and place when and where the same is to be made, and shall contain a brief general description of the property to be sold, and shall be sufficiently given if published once in each week for four successive weeks prior to such sale in a newspaper published in the Borough of Manhattan, in the City of New York, N. Y., and a newspaper published in St. Louis, Mo., unless another and different publication thereof shall be required by law, in which event, the notice or publication, or both, thus required shall be given and made.

Adjournments.

Section 8. The Trust Company may adjourn from time to time any sale by it to be made under the provisions in this indenture, by announcement at the time and place appointed for such sale, or for such adjourned sale or sales; and without further notice or publication, it may make such sale at the time and place to which the same shall be so adjourned.

Section 9. Upon the completion of any sale or sales under this indenture, the Trust Company shall execute and deliver to the accepted purchaser or purchasers a good and sufficient deed or good and sufficient deeds, and other instruments conveying, assigning and transferring the properties and franchises sold. The Trust Company and its successors hereby are appointed the true and lawful attorneys irrevocable of the Railway Company in its name and stead to make all necessary conveyances and assignments of property and all necessary transfers of securities thus sold; and for that purpose they may execute all necessary deeds and instruments of conveyance, assignment and transfer, and may substitute one or more persons with like power; the Railway Company hereby ratifying and confirming all that its said attorneys or such substitute or substitutes shall lawfully do by virtue hereof. Nevertheless the Railway Company shall, if so requested by the Trust Company, ratify and confirm any sale or sales by executing and delivering to the Trust Company or to such purchaser or purchasers all such instruments as may be necessary or in the judgment of the Trust Company proper for the purpose or as may be designated in such request.

Vesting title
in purchaser

Any such sale or sales made under or by virtue of this indenture, whether under the power of sale herein granted and conferred, or under or by virtue of judicial proceedings, shall operate to divest all right, title, interest, claim and demand whatsoever, either at law or in equity, of the Railway Company, of, in and to the premises and property so sold, and shall be a perpetual bar both at law and in equity, against the Railway Company, its successors and assigns, and against any and all persons claiming or to claim the premises and property sold, or any part thereof from through or under the Railway Company, its successors or assigns.

Sale to divest
all interest of
Railway
Company.

The personal property and chattels conveyed or intended to be conveyed by or pursuant to this indenture, other than securities and claims, shall be real estate for all the purposes of this indenture, and shall be held and taken to be fixtures and appurtenances of the said railways, and part thereof, and are to be used and sold therewith and not separate therefrom, except as herein otherwise provided.

Personal
property
mortgaged,
except securities,
to be
deemed
fixtures.

Trust Company's receipt a sufficient discharge to purchaser.

Section 10. The receipt of the Trust Company or of the court officer making any such sale for the purchase money paid at any such sale shall be a sufficient discharge therefor to any purchaser of the property or any part thereof, sold as aforesaid; and no such purchaser or his representatives, grantees or assigns, after paying such purchase money and receiving such receipt, shall be bound to see to the application of such purchase money upon or for any trust or purpose of this indenture, or in any manner whatsoever be answerable for any loss, misapplication or non-application of any such purchase money or any part thereof, or be bound to inquire as to the authorization, necessity, expediency or regularity of any such sale.

Principal to become due on sale.

Section 11. In case of a sale under any of the foregoing provisions of this Article, whether made under the power of sale herein granted or pursuant to judicial proceedings, or in case of a sale of any of the property embraced in this indenture in the enforcement of any lien or charge thereon prior to the lien of this indenture, whether such lien or charge be by mortgage or deed or other instrument of trust or otherwise, the principal sums of the First Terminal and Unifying Mortgage Bonds, if not previously due, shall immediately thereupon become due and payable, anything in said bonds or in this indenture to the contrary notwithstanding.

Application of proceeds of sale:

Section 12. The purchase money, proceeds or avails of any such sale, whether under the power of sale herein granted or pursuant to judicial proceedings, together with any other sums which then may be held by the Trust Company under any of the provisions of this indenture as part of the trust estate or the proceeds thereof, or of some part thereof, shall be applied as follows:

—FIRST, to payment of expenses, etc.

First. To the payment of the costs and expenses of such sale including a reasonable compensation to the Trust Company, its agents, attorneys and counsel, and of all expenses, liabilities and advances made or incurred by the Trust Company, and to the payment of all taxes, assessments or liens superior to the lien of this indenture, except the superior liens and any taxes, assessments or other charges, subject to which the property shall have been sold;

Second. To the payment of the whole amount then owing or unpaid upon the First Terminal and Unifying Mortgage Bonds for principal and interest, with interest on the overdue installments of interest at the rate of five (5) per centum per annum; and in case such proceeds shall be insufficient to pay in full the whole amount so due and unpaid upon said bonds, then to the payment of the principal and interest of said bonds, without preference or priority of principal over interest, or of interest over principal, or of any installment of interest over any other installment of interest, ratably to the aggregate of such principal and the accrued and unpaid interest; subject, however, to the provisions of Section 1 of this Article Fourth and of Section 1 of Article Third.

—SECOND, to payment of principal and interest.

Third. To the payment of the surplus, if any, to the Railway Company, its successors or assigns, or to whomsoever may be lawfully entitled to receive the same, or as a court of competent jurisdiction may direct.

—THIRD, surplus to Railway Company.

Section 13. Upon any such sale by the Trust Company or pursuant to judicial proceedings, any purchaser, for or in settlement or payment of the purchase price of the property purchased, shall be entitled to use and apply any First Terminal and Unifying Mortgage Bonds, and any matured and unpaid coupons by presenting such bonds and coupons in order that there may be credited thereon the sums applicable to the payment thereof out of the net proceeds of such sale to the owner of such bonds and coupons as his ratable share of such net proceeds, after the deduction of costs, expenses, compensations and other charges; and thereupon such purchaser shall be credited on account of such purchase price payable by him, with the portion of such net proceeds that shall be applicable to the payment of, and that shall have been credited upon, the bonds and coupons so presented; and at any such sale; any bondholders may bid for and purchase such property, and may make payment therefor as aforesaid, and upon compliance with the terms of sale, may hold, retain and dispose of such property without further accountability.

Purchaser may apply bonds and matured coupons in payment of purchase price.

Bondholders may bid.

Section 14. The Railway Company covenants that

On default
in payment
of interest
or principal,
Railway
Company to
pay whole
amount due.

(1) in case default shall be made in the payment of any interest on any First Terminal and Unifying Mortgage Bond or Bonds at any time outstanding, and such default shall have continued for a period of three months, or

(2) in case of default shall be made in the payment of the principal of any such bond or bonds when the same shall become payable, whether upon the maturity of said bonds or upon declaration as authorized by this indenture, or upon a sale as set forth in Section

11 of this Article Fourth or otherwise, then upon demand of the Trust Company, the Railway Company will pay to the Trustee, for the benefit of the holders of the First Terminal and Unifying Mortgage Bonds and coupons then outstanding, the whole amount which then shall have become due and payable on all such bonds and coupons then outstanding, for interest or principal, or both, as the case may be, with interest upon the overdue principal and installments of interest at the rate of five (5) per centum per annum; and in case the Railway Company shall fail to pay the same forthwith upon such demand, the Trust Company, in its own name and as trustee of an express trust, shall be entitled to recover judgment for the whole amount so due and unpaid.

Trust Com-
pany entitled
to recover
judgment
through other
proceedings.

The Trust Company shall be entitled to recover judgment as aforesaid, either before or after or during the pendency of any proceedings for the enforcement of the lien of this indenture; and the right of the Trust Company to recover such judgment shall not be affected by any entry or sale hereunder, or by the exercise of any other right, power, or remedy for the enforcement of the provisions of this indenture or the foreclosure of the lien thereof; and in case of a sale of the property subject to this indenture, and of the application of the proceeds of sale to the payment of the debt hereby secured, the Trust Company, in its own name and as trustee of an express trust, shall be entitled to enforce payment of, and to receive all amounts then remaining due and unpaid upon, any and all of the First Terminal and Unifying Mortgage Bonds then outstanding, for the benefit of the holders thereof, and shall be entitled to recover judg-

Trust Com-
pany entitled
to collect
deficiency.

ment for any portion of the debt remaining unpaid, with interest. No recovery of any such judgment by the Trust Company, and no levy of any execution upon any such judgment upon property subject to this indenture, or upon any other property, shall in any manner or to any extent affect the lien of this indenture upon the property, or any part of the property, subject to this indenture, or any rights, powers or remedies of the Trust Company hereunder, or any lien, rights, powers or remedies of the holders of the First Terminal and Unifying Mortgage Bonds, but such lien, rights, powers and remedies of the Trust Company and of the bondholders shall continue unimpaired as before. *

Recovery of judgment not to affect lien.

Any moneys thus collected by the Trust Company under this Section shall be applied by the Trust Company, first, to the payment of the expenses, disbursements and compensation of the Trust Company, its agents and attorneys, and, second, toward payment of the amounts then due and unpaid upon such bonds and coupons in respect of which such moneys shall have been collected, ratably and without any preference or priority of any kind (except as provided in Section 1 of this Article Fourth and in Section 1 of Article Third), according to the amounts due and payable upon such bonds and coupons, respectively, at the date fixed by the Trust Company for the distribution of such moneys, upon presentation of the several bonds and coupons and stamping such payment thereon, if partly paid, and upon surrender thereof, if fully paid.

Application of moneys recovered.

Section 15. The Railway Company will not, at any time, insist upon or plead, or in any manner whatever claim, or take the benefit or advantage of, any stay or extension law or laws, now or at any time hereafter in force; nor will it claim, take or insist upon any benefit or advantage from any law now or hereafter in force providing for the valuation or appraisement of the property, or any part of the property, subject to this indenture, prior to any sale or sales thereof to be made pursuant to any provision herein contained, or to the decree, judgment or order of any court of competent jurisdiction; nor, after any such sale or sales, will it claim or exercise any right under any statute enacted by the United States of America, or by any state or territory or otherwise, to redeem

Waiver of stay or extension, valuation, or appraisement laws—

—and right of redemption.

the property so sold or any part thereof; and it hereby expressly waives all benefit and advantage of any such law or laws, and it covenants that it will not hinder, delay or impede the execution of any power herein granted and delegated to the Trust Company, but that it will suffer and permit the execution of every such power as though no such law or laws had been made or enacted.

Rights of Trust
Company on
instituting
judicial
proceedings.

Section 16. Upon filing a bill in equity, or upon commencement of any other judicial proceedings, to enforce any right of the Trust Company or of the bondholders under this indenture, the Trust Company shall be entitled to exercise the right of entry, and also any and all other rights and powers herein conferred and provided to be exercised by the Trust Company upon the happening of an event of default as hereinbefore provided; and, as matter of right, the Trust Company shall be entitled to the appointment of a receiver of the premises and property subject to this indenture, and of the earnings, income, revenue, rents, issues and profits thereof, with such powers as the court making such appointment shall confer; but notwithstanding the appointment of any receiver, the Trust Company shall be entitled, as pledgee, to continue to retain possession and control of any securities, bonds, cash and other property pledged or to be pledged with the Trust Company hereunder.

Voluntary
surrender of
possession
to Trust
Company.

Section 17. At any time hereafter before full payment of the First Terminal and Unifying Mortgage Bonds, and whenever it shall deem expedient for the better protection or security of such bonds (although then none of the events of default shall have happened), the Railway Company, with the consent of the Trust Company, may surrender and may deliver to the Trust Company full possession of the whole or of any part of the property, premises and interests hereby conveyed or assigned, or intended so to be, and may authorize the Trust Company to collect the dividends and interest on all securities, bonds, and other obligations subject to this indenture, for any period, fixed or indefinite. In such event the Trust Company shall enter into and upon the premises and property so surrendered and delivered, and shall take and receive possession thereof for such period, fixed or indefinite, as aforesaid, without prejudice, however, to its right at any time subsequently, when entitled thereto by any provision of this indenture, to

insist upon maintaining and to maintain, such possession though beyond the expiration of any such prescribed period, and the Trust Company, from the time of its entry upon such premises and property, shall work, maintain, use, manage, control and employ the same in accordance with the provisions of this indenture, and shall receive and apply the income and revenues thereof as provided in Section 2 of this Article Fourth. Upon application of the Trust Company, and with the consent of the Railway Company, if none of the events of default has happened, and without such consent if then one of the events of default has happened, a receiver may be appointed to take possession of, and to operate, maintain and manage the whole or any part of the property subject to this indenture, and the Railway Company shall transfer and deliver to such receiver all such property, wheresoever the same may be situated; and in every case, when a receiver of the whole or of any part of said property shall be appointed under this Section 17, or otherwise, the net income and profits of such property shall be paid over to, and shall be received by, the Trust Company, for the benefit of the holders of the First Terminal and Unifying Mortgage Bonds; provided, however, that notwithstanding the appointment of any such receiver, the Trust Company, as pledgee, shall be entitled to retain possession and control of any securities, bonds, cash and other property pledged or to be pledged with the Trust Company hereunder.

Appointment
of receiver.

Section 18. No holder of any First Terminal and Unifying Mortgage Bond or coupon shall have any right to institute any suit, action or proceeding in equity or at law for the foreclosure of this indenture, or for the execution of any trust hereunder, or for the appointment of a receiver, or for any other remedy hereunder unless such holder previously shall have given to the Trust Company written notice of such default and of the continuance thereof, as hereinbefore provided, nor unless also the holders of fifteen per cent. in amount of the First Terminal and Unifying Mortgage Bonds then outstanding shall have made written request upon the Trust Company, and shall have afforded to it a reasonable opportunity either to proceed to exercise the powers hereinbefore granted, or to institute such action, suit or proceeding in its own name; nor, unless, also, they shall have

Bondholders
not to sue
until
application
made to Trust
Company.

offered to the Trust Company security and indemnity satisfactory to it against the costs, expenses and liabilities to be incurred therein or thereby; and such notification, request and offer of indemnity are hereby declared in every such case, at the option of the Trust Company, to be conditions precedent to the execution of the powers and trusts of this indenture and to any action or cause of action for foreclosure or for the appointment of a receiver or for any other remedy hereunder; it being understood and intended that no one or more holders of First Terminal and Unifying Mortgage Bonds and coupons shall have any right in any manner whatever by his or their action to affect, disturb or prejudice the lien of this indenture, or to enforce any right hereunder, except in the manner herein provided, and that all proceedings at law or in equity shall be instituted, had and maintained in the manner herein provided and for the equal benefit of all holders of such outstanding bonds and coupons.

Remedies
cumulative.

Section 19. Except as herein expressly provided to the contrary, no remedy herein conferred upon or reserved to the Trust Company or to the holders of First Terminal and Unifying Mortgage Bond is intended to be exclusive of any other remedy or remedies, and each and every such remedy shall be cumulative, and shall be in addition to every other remedy given hereunder or now or hereafter existing at law or in equity or by statute.

Delay not a
waiver of
default.

Section 20. No delay or omission of the Trust Company or of any holder of First Terminal and Unifying Mortgage Bonds to exercise any right or power accruing upon any default, shall impair any such right or power or shall be construed to be a waiver of any such default, or an acquiescence therein; and every power and remedy given by this Article to the Trust Company and to the bondholders respectively, may be exercised from time to time, and as often as may be deemed expedient, by the Trust Company or by the bondholders, respectively.

Railway
Company and
Trust
Company
restored to
former position
on termination
of proceedings
to enforce
rights.

Section 21. In case the Trust Company shall have proceeded to enforce any right under this indenture by foreclosure, entry or otherwise, and such proceedings shall have been discontinued or abandoned because of waiver or for any other reason, or shall have been determined adversely to the Trust Company, then, and in every such case, the Railway Company and the Trust Company shall severally and respec-

tively be restored to their former position and rights hereunder in respect of the mortgaged premises, and all rights, remedies and powers of the Trust Company shall continue as though no such proceedings had been taken.

ARTICLE FIFTH.

Section 1. The Guaranty Trust Company of New York, one of the Trustees hereunder, or any trust company which may be appointed its successor in the trust hereunder, shall receive and retain, as one of the trustees hereunder, the sole custody and possession of all bonds and other securities and the certificates for all stocks, and also all moneys which shall be delivered or pledged or deposited pursuant to any provision of this indenture.

Section 2. The Trust Company is authorized to cause any and all coupon bonds delivered to it as security hereunder, or which at any time hereafter may be delivered to its as security hereunder, to be stamped "Not negotiable. Held by Guaranty Trust Company of New York, as Trustee, under the First Terminal and Unifying Mortgage of St. Louis Southwestern Railway Company, dated January 1, 1912," and the Trust Company shall transfer or cause to be transferred into its name, as one of the Trustees hereunder, or into the name of one or more of its nominees, all certificates for shares of stock delivered to it under any provision of this indenture.

Section 3. It is expressly agreed that, while and so long as there shall be no default in the payment of the principal or interest on any of the bonds secured hereby (unless the Railway Company shall have voluntarily surrendered possession of the mortgaged premises, as herein authorized), the Trust Company shall detach and deliver to the Railway Company all coupons as the same mature on bonds deposited and pledged under this indenture, and will execute and deliver to the Railway Company, upon the written order of its President, or a Vice-President, assignments of or orders for any dividends which may be declared or be payable upon any deposited or pledged stocks registered in the name of the Trust Company, and, similarly, will also make and deliver to the Railway Company such orders or assignments as may be

PROVISIONS AS
TO SECURITIES
PLEGDED.

Trust
Company to
have custody
of securities
and moneys
hereunder.

Bonds to be
stamped.

Stock to be
transferred
into name of
Trust
Company.

Interest on
bonds and
dividends on
stock deposited
hereunder to
be paid over to
Railway
Company.

Trust
Company to
execute
proxies
enabling
Railway
Company to
vote stocks.

necessary in order to enable the Railway Company to receive and collect any payments made for or on account of the interest on any other obligations deposited or pledged with the Trust Company hereunder as part of the security hereof, and, so long as the Railway Company shall not be in default hereunder, as aforesaid, and shall not have surrendered possession, as aforesaid, the Railway Company shall have the right to vote upon all shares of stock pledged hereunder, for all purposes not inconsistent with the provisions and purposes of this indenture, and with the same force and effect as if such pledge had not been made, but subject to the restrictions and agreements contained in this indenture; and the Trust Company shall, from time to time, upon the demand of the Railway Company, evidenced by a certified copy of a resolution of its board of directors or executive committee, make and deliver to the Railway Company proxies enabling the Railway Company, or such person or persons as it may designate, to vote any of said stocks registered in the name of the Trust Company at any meeting or meetings of the company or companies which shall have issued the same. Every such proxy shall contain the express provision that the same shall not be construed to authorize the holder thereof to vote to sell, or otherwise dispose of, or lease (unless such lease be upon the express condition that it shall terminate at the election of the Trust Company, in case of the happening of any event of default), any railroad or property belonging to such company, or any property required for the operation thereof, except to the Railway Company or to some other company all of whose capital stock (except qualifying shares) shall then be owned by the Railway Company and be held by the Trust Company subject to the lien of this indenture or shall be held under some one of the "underlying mortgages."

Disposition of
certain sums
paid Trust
Company in
respect of
pledged bonds
or stock.

Section 4. In case, while and so long as there shall be no default hereunder, any sums shall be paid on account of the principal of any bonds at any time held by the Trust Company subject to the lien of this indenture, or in case any sums shall be paid on account of the interest of any such bonds out of the proceeds of the sale of the property covered by any mortgage or other indenture securing such bonds, or in case, upon the dissolution or liquidation of any company, any sums be paid upon any shares of stock of such com-

pany pledged hereunder, then in every such case any such sums shall be collected and received by the Trust Company and held by it and paid over from time to time for any one or more of the purposes set forth and upon the terms and conditions prescribed in Sections 8 or 9 of Article Second hereof.

Section 5. In the event that the Railway Company shall at any time acquire title to all of the property of any company or companies, all of whose mortgage bonds are owned by it and are pledged and deposited with the Trust Company, the Trust Company shall, upon the written request of the President or a Vice-President of the Railway Company, and upon conveyance and assignment to the Trustees of this indenture of all the property so acquired by the Railway Company, cause such bonds to be canceled and delivered to the trustee of the mortgage or lien securing the same, for the purpose of obtaining the discharge and satisfaction of such mortgage or lien, and shall cancel all stock of said company which may be held by it and deliver the same to the Railway Company. A certificate, signed or purporting to be signed by the President or a Vice-President of the Railway Company under its corporate seal, may be received by the Trust Company as conclusive evidence of any of the facts mentioned in this section, and shall be full warrant and protection to the Trust Company for its action on the faith thereof.

Disposition of
pledged stock
and bonds
upon
acquisition of
property of
issuing
company.

Section 6. The Trust Company shall from time to time, upon the request of the Railway Company, evidenced by a certified copy of a resolution of its Board of Directors or Executive Committee, or may, in its discretion, without such request, join in any plan or agreement for the reorganization, adjustment, refunding, exchange or protection of any bonds or stocks deposited and pledged with it under this indenture, and shall upon like request of the Railway Company deposit said bonds or stocks, or such of them as may be specified in said request, with any committee, depository, bank, bankers, or otherwise, and may accept new securities issued in lieu of or in exchange for any such bonds or stocks, or certificates of deposit representing the same, which new securities shall be held subject to the lien of this indenture and all of the provisions thereof; and the Trust Company shall also, upon like request, or may, in its discretion, without

Trust
Company may
join in any
plan for
reorganization
or exchange of
deposited
securities.

Extended obligations may be secured by lien on at least same property as obligations surrendered.

Certificate of counsel.

New bonds to be held in same manner as those exchanged.

Trust Company may maintain corporate existence of companies whose stock is pledged hereunder.

In case of default on obligations pledged hereunder, Trust Company may foreclose.

such request, consent to the extension and renewals of any bonds or obligations pledged with it hereunder, or received in exchange for bonds or obligations, pledged with it hereunder, and to the extension of the mortgages, liens or trusts securing the same, and in any such cases the Trust Company shall surrender the bonds or obligations held by it under the provisions of this indenture, and in lieu thereof receive other bonds or renewed bonds or obligations or interest certificates or receipts representing the same; provided, however, that such other or extended or renewed bonds or obligations shall be secured by a lien or charge upon at least the same property as the bonds or obligations surrendered. The Trust Company shall receive the certificate of counsel of the Railway Company as conclusive evidence that such exchange, extension or renewal is in compliance with the provisions of this section. Any such request or certificate as is provided for by this Section 6 shall be full warrant and protection to the Trust Company for its action on the faith thereof. All bonds and obligations received in exchange for or in extension or renewal of bonds or obligations now or hereafter held by the Trust Company hereunder shall be held by the Trust Company subject to the lien of this indenture, in the same manner and to the same extent as the bonds and obligations in exchange for which or in extension or renewal of which they shall have been received.

Section 7. The Trust Company, upon the request of the Railway Company, or, in its discretion, without such request, may do whatever may be necessary for the purpose of maintaining or preserving the corporate existence of any and all companies, a greater portion of whose stock shall, at any time, be pledged hereunder, and for such purposes, from time to time, may sell, assign, transfer and deliver so many shares of stock of such companies as may be necessary to qualify persons to act as directors of, or in any other official relation to, said companies; and in every case the Trust Company may make such arrangements as it shall deem necessary for the protection of the Trust hereunder.

Section 8. In case default shall be made in the payment of the principal or interest of any of the bonds or obligations at any time subject to the lien of this indenture, or of other bonds or obligations secured by the same mortgage or lien as such bonds or obligations

held by the Trust Company, then in any such case the Trust Company may, in its discretion, cause proper proceedings to be instituted and prosecuted in some court of competent jurisdiction to foreclose or enforce the mortgage or lien by which such bonds or obligations in default are secured.

In case, at any time, any company of whose capital stock the greater part shall be held by the Trust Company hereunder shall be dissolved or liquidated, or in case all or any of the property of any such company shall be sold upon the insolvency of such company at any judicial or other sale, or in case any property covered by a mortgage securing any bonds, or subject to any lien for the payment of any obligations held by the Trust Company hereunder, shall be sold upon foreclosure of such mortgage, or by enforcement of such lien, then in any such case, if the property of such company, or the property sold, can be acquired by crediting on the bonds, obligations, claims or stock held by the Trust Company hereunder any sum accruing or to be received thereon out of the proceeds of such property, and paying not more than fifteen per cent. of the price of such property in cash, the Trust Company, in its discretion, may, but if by the Railway Company requested in writing and provided with the amount of cash necessary therefor, the Trust Company in every case shall purchase, or cause to be purchased, or permit the Railway Company to purchase such property, in the name or on behalf of the Trust Company or of the Railway Company or by purchasing trustees, and shall use, or permit the Railway Company to use such bonds, obligations, claims, and stock, so far as may be, to make payment for such property; and in case of such purchase the Trust Company shall take such steps as it may deem proper to cause such property to be vested either in the Railway Company, subject to the lien of this indenture, or in some other corporation organized or to be organized for that purpose, of whose bonded debt and capital stock all excepting the number of shares required to qualify directors shall be received and held hereunder by the Trust Company, and shall be held for the Railway Company but subject to the lien of this Indenture.

Use of pledged bonds and stock on sale of property of issuing company

Expenses
of Trust
Company
in such
proceedings
to be paid by
Railway
Company.

The Railway Company covenants that, on demand of the Trust Company, it, the Railway Company, forthwith will pay or satisfactorily provide for all expenditures incurred by the Trust Company under any of the provisions of this section, including all sums required to obtain and perfect the ownership and title to any property which the Trust Company shall purchase or cause to be purchased pursuant to the provisions of this section; and in case the Railway Company shall fail so to do, then, without impairment of, or prejudice to, any of its rights hereunder by reason of the default of the Railway Company, the Trust Company, in its discretion, may advance all such expenses and other moneys required, or may procure such advances to be made by others, and for the payment in six months thereafter, with interest, of such advances made by the Trust Company, or by others at its request, the Trust Company shall have a lien prior to the lien of this indenture, on all the bonds, obligations, shares and other property in respect of which such advances were made, and the proceeds thereof and any property acquired by means of such bonds, obligations or shares.

Trust
Company
if it does not
purchase at
foreclosure
sale, to receive
proceeds of
sale, to be
held under
Sections 8 and
9 of Article
Second.

In case the Trust Company shall not purchase or cause to be purchased the property sold at any such sale, and shall not join in a plan of reorganization as aforesaid in respect of such bonds or stock, then the Trust Company shall receive any portion of the proceeds of the sale accruing on the bonds, obligations and stocks by it held hereunder, and such proceeds, from time to time, shall be paid over to the Railway Company for the purposes and in the manner and subject to the restrictions set forth in Sections 8 and 9 of Article Second hereof.

Merger or
consolidation
or sale
permitted.

Section 9. Anything in this indenture to the contrary notwithstanding, any company all of whose shares of capital stock (except qualifying shares) shall be subject to the indenture may be merged or consolidated with, or all or any part of the property of any such company may be sold either to the Railway Company, or to any other railway company all of whose capital stock (except qualifying shares) shall then be assigned or pledged to the Trust Company hereunder, or shall be held under any of such "underlying mortgages," but no such merger, consolidation or sale shall be made except upon condition (first) that in case of any merger or consolidation all of the stock (except qualifying shares) of the consolidated company or the

Conditions of
consolidation
or merger or
sale.

company (other than the Railway Company) into which any such company shall be merged shall be received, or shall continue to be held, by the Trust Company under this indenture, or shall be received or continued to be held under some one of the "underlying mortgages"; and (second) that in case of any such merger, consolidation or sale, neither of the companies which shall be parties thereto (other than the Railway Company) nor any consolidated or new company formed thereby shall, in connection therewith, create or incur any indebtedness or any lien, charge or incumbrance upon its property unless such indebtedness, lien, charge or incumbrance shall become subject to this indenture; and (third) that in case of a merger or consolidation with, or sale to, the Railway Company this indenture shall become a lien upon the railway and all property appertaining to the railway of the company merged or consolidated with, or whose property shall be sold to, the Railway Company, subject only to pre-existing mortgages, if any, upon the property so merged, consolidated or sold.

Under the conditions aforesaid, any such merger, consolidation or sale may be made under any laws to which such company may be subject, and, upon request of the Railway Company, the Trust Company shall consent to all acts proper to carry into effect the purposes of this section.

ARTICLE SIXTH.

No recourse under or upon any obligation, covenant or agreement contained in this indenture, or in any First Terminal and Unifying Bond or coupon, or because of the creation of any indebtedness hereby secured, shall be had against any stockholder, officer or director of the Railway Company, or of any successor corporation, either directly or through the Railway Company, by the enforcement of any assessment or by any legal or equitable proceeding by virtue of any statute or otherwise; it being expressly agreed and understood that this indenture and the obligations hereby secured are solely corporate obligations, and that no personal liability whatever shall attach to or be incurred by the stockholders, officers or directors of the Railway Company, or of any successor corporation, or any of them, because of the incurring of the indebtedness hereby authorized, or under or by reason of any of the obligations, covenants or agreements

WAIVER OF
LIABILITY OF
STOCKHOLDERS,
OFFICERS AND
DIRECTORS.

contained in this indenture, or in any of the bonds or coupons hereby secured, or implied therefrom; and that any and all personal liability of every name and nature, and any and all rights and claims against every such stockholder, officer or director, whether arising at common law or in equity, or created by statute or constitution, are hereby expressly released and waived as a condition of, and as part of the consideration for, the execution of this indenture and the issue of the bonds and interest obligations hereby secured.

ARTICLE SEVENTH.

Any demand, request or other instrument, required by this indenture to be signed and executed by bondholders, may be in any number of concurrent writings of similar tenor, and may be signed or executed by such bondholders in person or by agent appointed in writing. Proof of the execution of any such demand, request or other instrument, or of the writing appointing any such agent, and of the ownership by any person of bonds, shall be sufficient for any purpose of this indenture, and shall be conclusive in favor of the Trust Company or of the Railway Company, with regard to action taken by them or either of them under such instrument, if such proof be made in the following manner:

The fact and date of the execution by any person of any such demand, request, or other instrument of writing may be proved by the certificate of any notary public or other officer authorized to take acknowledgements of deeds to be recorded in New York, that the person signing such demand, request or other instrument or writing acknowledged to him the execution thereof, or by an affidavit of a witness to such execution.

The fact of the holding by any bondholder of coupon bonds transferable by delivery, and the amounts and issue numbers of such bonds, and the date of his holding the same, may be proved by a certificate executed by any trust company, bank, bankers or other depository (wherever situated), if such certificate shall be deemed by the Trust Company to be satisfactory showing that at the date therein mentioned such person had on deposit with such depos

BONDHOLDERS'
ACTS, HOLDINGS
AND
AUTHORITY.

Form and
proof of
execution of
instruments by
bondholders.

Proof of
ownership
of bonds.

itary the bonds described in such certificate. For all purposes of this indenture and of any proceeding for the enforcement thereof, such person shall be deemed to continue the holder of such bonds until the Trust Company shall have received notice in writing to the contrary.

The ownership of registered coupon bonds or of registered bonds without coupons shall be proved by the registers of such bonds.

ARTICLE EIGHTH.

Section 1. Upon the written request of the President or of a Vice-President of the Railway Company, approved or authorized by resolution of its Board of Directors or Executive Committee, from time to time, while the Railway Company is in possession thereof, but subject to the conditions and limitations in this Section prescribed, and not otherwise, the Trustees shall release from the lien and operation of this indenture any part of the mortgaged railways and lands, provided (1) that no part of the lines of track or of the rights of way shall be released unless the use thereof no longer shall be necessary or advantageous in the operation of any of the lines of railway described in the Granting Clause hereof, or other lines subject to this indenture, and that no part of such lines of track or rights of way shall so be released if thereby the continuity of the lines of railway of the system of the Railway Company shall be broken; and (2) that no part of the other property subject to this indenture shall be released hereunder, unless at the time of such release it no longer shall be necessary or advantageous to retain the same for the operation, maintenance or use of the lines of railway, or for use in the business of the Railway Company. No such release shall be made unless the Railway Company shall have sold, or shall have contracted to sell, the property so to be released, or shall have exchanged or shall have contracted to exchange the property so to be released for other property, nor unless the trustee under any indenture constituting a prior lien on the property so sold or on part thereof, shall likewise release from the lien thereof such property subject to such prior indenture. The proceeds of any and all such sales, and all moneys received as compensation for any property subject to this indenture taken by exercise of the power of eminent domain (unless applied in

RELEASES OF
MORTGAGED
PROPERTY.

Release
permitted.

Restrictions.

Application
of proceeds of
property
released or
taken by
eminent
domain.

accordance with the requirements of indentures constituting prior liens on the property so sold or on part thereof) shall be paid to the Trust Company and shall be set apart and held in trust by it and shall be applied, at the request of the Railway Company, to the purchase of other property, real or personal (including rolling stock and equipment), which shall become subject to this indenture, or in betterments of, or additions to, the mortgaged premises. Such purchases, betterments and additions shall be made as directed by the Railway Company and the amount thereof shall be paid by the Trust Company out of such proceeds in pursuance of the written request of the Railway Company expressed over the signature of its President or one of its Vice-Presidents by order of its Board of Directors by resolution of such board, and such request shall constitute a sufficient warrant, direction and justification to the Trust Company for the payment of money as therein and thereby requested. Any new property acquired by the Railway Company to take the place of any property released hereunder, ipso facto shall become and be subject to this indenture, as fully as if specifically mortgaged or assigned hereby, but, if requested by the Trust Company, the Railway Company will convey and assign the same to the Trustees by appropriate deeds or other instruments upon the trusts and for the purposes of this indenture, and will cause such deeds or other instruments to be recorded or filed in such manner as appropriately to secure and continue the lien of this indenture thereon. The Railway Company, from time to time, while in possession of any of the property subject to this indenture, also shall have full power in its discretion to dispose of any portion of the machinery, rails, equipment and implements, at any time subject to the lien hereof, which may have become unserviceable, replacing the same by new machinery, rails, equipment or implements, of at least equal value, which shall become subject to this indenture. In no event shall any purchaser or purchasers of any property sold or disposed of under any provision of this Article Eighth be required to see the application of the purchase money.

Substituted
property to be
subject to lien
of indenture.

Railway
Company
permitted
to dispose of
machinery,
rails, etc.

—to change
location of
tracks and
structures.

Section 2. The Railway Company may at any time make any change in the location of any of the tracks station-houses, buildings or other structures upon any part of the mortgaged premises, and the Trustees

upon conveyance to them under the terms of this indenture of such new tracks, station-houses, buildings or other structures, and the premises on which the same may be erected, shall, at the request of the Railway Company, subject, however, to the provisions of Section 1 of this Article Eighth, release from the lien of this indenture, the tracks, station-houses, buildings and other structures, the location of which shall be so changed, and the premises on which they were erected, and shall execute and deliver any and all instruments necessary and proper to effect such purpose.

Section 3. The Railway Company from time to time may make changes or alterations in, or substitutions of, any leases trackage rights or contracts that are subject to this indenture, and, with the consent of the Trust Company, may terminate any such lease, trackage right or contract. In any such event, any modified, altered or substituted leases, contracts or trackage rights forthwith shall become bound by, and be subject to, this indenture, in the same manner as those previously existing. The Railway Company, may, without obtaining the consent of the Trust Company hereof, terminate any lease, trackage right or contract whereby there is granted to any other company or companies the right to use in any respect or to any extent any portion or portions of the lines of railroad of the Railway Company at the time subject to the lien of this indenture.

—to alter
leases or
trackage
contracts.

—to terminate
leases or
trackage
contracts.

Section 4. In case any of the property subject to this indenture shall be in the possession of a receiver lawfully appointed, the powers in and by this Article Eighth conferred upon the Railway Company may be exercised by such receiver with the approval of the Trust Company, and if the Trust Company shall be in possession of any of such property under any provision of this indenture, then all the powers of this Article Eighth conferred upon the Railway Company may be exercised by the Trust Company in its discretion.

Receiver or
Trust
Company
in possession
may exercise
power of
Railway
Company.

Section 5. A certificate under the corporate seal of the Railway Company signed or purporting to be signed by the President or a Vice-President of the Railway Company and made in pursuance of a resolution of the Board of Directors, may be received by the Trust Company as conclusive evidence of any of the facts mentioned in this Article Eighth, and shall

Certificate
to protect
Trust
Company.

be full warrant and protection to the Trust Company for its action on the faith thereof.

**CONCERNING
THE TRUSTERS.**

Conditions of acceptance of trust:

Trustees not required to record indenture, procure insurance, discharge taxes, or procure performance by Railway Company.

Trust Company entitled to compensation and expenses.

Trustees not responsible for recitals.

Trust Company may assume default not to exist until notified.

ARTICLE NINTH.

Section 1. The Trustees accept the trusts of this indenture and agree to execute them upon the following terms and conditions, to which the parties and the holders of the First Terminal and Unifying Mortgage Bonds agree:

The Trustees shall be under no obligation to see to the record, registry, filing or re-filing of this indenture; or, while not in possession thereof, to see to the insurance of the mortgaged premises, or to the payment of taxes and assessments thereon or on the trust estate; or to the performance or observance of any of the covenants or agreements hereof on the part of the Railway Company.

The Trust Company shall be entitled to reasonable compensation for all services rendered by it in the execution of the trusts hereby created, and such compensation, as well as all reasonable expenses necessarily incurred and actually disbursed hereunder, the Railway Company agrees to pay.

The Trustees shall not be responsible in any manner whatsoever for the recitals herein contained, all of which are made by the Railway Company solely.

Unless and until the Trust Company shall have received written notice to the contrary from the holders of not less than fifteen per cent. in amount of the First Terminal and Unifying Mortgage Bonds then outstanding, the Trust Company may, for all the purposes of this indenture, assume that no default has been made in the payment of any of the First Terminal and Unifying Mortgage Bonds or of the interest thereon, or in the observance or performance of any of the covenants contained in the First Terminal and Unifying Mortgage Bonds or in this indenture; that no receiver has been appointed of the Railway Company or of its lines of railroad and property; that the Railway Company is not in default under this indenture; and that none of

the events hereinbefore denominated events of default has happened.

The Trust Company shall not be under any obligation to take any action toward the execution or enforcement of the trusts hereby created which, in its opinion will be likely to involve it in expense or liability, unless one or more of the holders of the First Terminal and Unifying Mortgage Bonds shall, as often as required by the Trust Company, furnish it security and indemnity satisfactory to it against such expense or liability; nor shall the Trust Company be required to take notice of any default hereunder unless notified in writing of such default by the holders of at least fifteen per cent. in amount of the First Terminal and Unifying Mortgage Bonds then outstanding; or to take any action in respect of any such default involving expense or liability unless requested by an instrument in writing signed by the holders of not less than fifteen per cent. in amount of the First Terminal and Unifying Mortgage Bonds then outstanding and unless tendered reasonable security and indemnity as aforesaid, anything herein contained to the contrary notwithstanding; but neither any such notice or request, nor this provision therefor, shall affect any discretion herein given to the Trust Company to determine whether or not the Trust Company shall take action in respect to such default, or take action without such request.

Trust Company not required to incur expense or liability without indemnity—

—nor to take any action with respect to default without notice and request.

Discretionary power of Trust Company.

The Trust Company may employ agents or attorneys in fact, and shall not be answerable for the default or misconduct of any agent or attorney appointed by it in pursuance hereof, if such agent or attorney shall have been selected with reasonable care; nor for anything whatever in connection with this trust, except its own wilful misconduct or gross negligence.

Trust Company authorized to employ agents.

The Trust Company shall be reimbursed and indemnified against any liability or damage it may sustain or incur in the premises, and shall have a lien upon the trust estate under this indenture preferentially to the First Terminal and Unifying Mortgage Bonds for its compen-

Trust Company to have prior lien.

sation and expenses, and also for any such liability or damages.

Trust
Company
protected in
acting on
advice of
counsel.

The Trust Company may advise with legal counsel, and any action under this indenture, taken or suffered in good faith by the Trust Company in accordance with the opinion of counsel, shall be conclusive on the Railway Company and on all holders of First Terminal and Unifying Mortgage Bonds, and the Trust Company shall be fully protected in respect thereof.

Resignation of
Trustees—
notice.

Section 2. The Trustees, or either of them, or any successor trustee, may resign and be discharged from the trust created by this indenture by giving to the Railway Company notice in writing of such resignation, specifying a date when such resignation shall take effect, which notice shall be published at least once, on a day not less than thirty days nor more than sixty days prior to the date so specified, in a daily newspaper of general circulation at that time published in the Borough of Manhattan, in the City of New York, N. Y. Such resignation shall take effect on the day specified in such notice, unless previously a successor trustee shall have been appointed as hereinafter provided, in which event such resignation shall take effect immediately upon the appointment of such successor trustee.

Removal of
Trustee.

Any Trustee hereunder may be removed at any time by an instrument in writing, filed with the Trustee to be removed, and executed by the holders of two-thirds in amount of the First Terminal and Unifying Mortgage Bonds then outstanding.

Appointment
of successor by
bondholders.

Section 3. In case, at any time, any Trustee hereunder shall resign or shall be removed or otherwise shall become incapable of acting, a successor may be appointed by the holders of a majority in amount of the First Terminal and Unifying Mortgage Bonds then outstanding, by an instrument or concurrent instruments signed by such bondholders or their attorneys in fact duly authorized, but until a new trustee shall be appointed by the bondholders as herein authorized, the Railway Company may, by proper instrument in writing, executed under its corporate seal by order of its Board of Directors, appoint a trustee to fill such vacancy. Any corporate trustee appointed under any of the provisions of this Article

—by Railway
Company.

Ninth shall always be a trust company having an office in the Borough of Manhattan, in the City of New York, N. Y., and having a capital and surplus aggregating at least two million dollars. The Trust Company, and every successor trust company trustee, shall be exempt from giving any bond or surety in respect to the execution of the trusts or powers herein contained, or otherwise in respect of the premises.

Trust
Company
exempt from
giving bond.

After any such appointment by the Railway Company, it shall cause notice of such appointment to be published once a week in each of four successive weeks in two daily newspapers of general circulation in the Borough of Manhattan, in the City of New York, N. Y., but any new trustee so appointed by the Railway Company shall immediately and without further act be superseded by a trustee appointed in the manner above provided by the holders of a majority in amount of the First Terminal and Unifying Mortgage Bonds.

Notice of
appointment
by Railway
Company.

Section 4. Any successor trustee appointed hereunder shall execute, acknowledge and deliver to the Railway Company an instrument accepting such appointment hereunder, and thereupon such successor trustee without any further act, deed or conveyance shall be invested with the appropriate estate, authority, rights, powers, duties and trusts of its predecessor in the trust hereunder with like effect as if originally named as trustee herein; and, upon the resignation or removal of any trustee, all the estate, right, title, and interest of such trustee in the trust estate shall wholly cease and determine; but nevertheless the Railway Company, its successors and assigns, will, in any and every such case, execute upon request of such trustee so appointed, any such deeds, conveyances, or assurances as shall, in the judgment of the trustee so appointed, be desirable or necessary to enable the trustee so appointed, to execute the trusts by this indenture created as fully and completely as if such appointed trustee had been originally trustee; and in every case of resignation by a trustee, or of a removal of a trustee, the trustee so resigning or removed, shall, at the request of the Railway Company, its successors or assigns, or of the trustee so appointed, make and execute such deeds, conveyances or assurances to its successors. All the conveyances herein provided for shall be at the cost of the Railway Company, its successors or assigns.

Vesting
mortgaged
premises in
successor.

Merger or
consolidation
of Trust
Company.

Section 5. Any company into which the Trust Company, or any successor to it in the trusts created by this indenture may be merged, or with which it or any such successor to it may be consolidated, or any company resulting from any merger or consolidation to which the Trust Company or any successor to it shall be a party, provided such company shall be a corporation organized under the laws of the State of New York and shall do business in the Borough of Manhattan, in the City of New York, shall be the successor trustee under this indenture without the execution or filing of any paper or any further act on the part of any of the parties hereto, anything herein to the contrary notwithstanding.

Meaning of
term
"Trustees."

Section 6. The term "Trustees," wherever used in this indenture, means the trustees for the time being under this indenture, whether original or successor.

POSSESSION
UNTIL DEFAULT
—DEFEASANCE
CLAUSE.

Possession in
Railway
Company until
default.

ARTICLE TENTH.

Section 1. Until some default shall have been made in the due and punctual payment of some instalment of interest on, or of the principal of some one or more of the First Terminal and Unifying Mortgage Bonds at the time outstanding, or of some part of such interest or principal, or until some one or more of the events of default specified in subdivisions (b), (c) and (d) of Section 2 of Article Fourth shall have happened, the Railway Company, its successors and assigns, shall be suffered and permitted to retain actual possession of all the property subject to this indenture (other than bonds, securities, cash and other property pledged or to be pledged hereunder with the Trust Company), and to manage, operate and use the same and every part thereof, with the rights and franchises appertaining thereto, and to collect, receive, take, use and enjoy the tolls, earnings, income, rents, issues and profits thereof.

Defeasance
clause.

Section 2. If, when the First Terminal and Unifying Mortgage Bonds shall have become due and payable, the Railway Company shall well and truly pay, or cause to be paid, the whole amount of the principal and interest due upon all of the First Terminal and Unifying Mortgage Bonds and coupons then outstanding, or shall provide for the payment of such bonds and coupons by depositing with the Trust Company hereunder the entire amount due thereon for principal and interest, and also shall pay, or cause to

be paid, all other sums payable hereunder by the Railway Company, and shall well and truly keep and perform all the things herein required to be kept and performed by it according to the true intent and meaning of this indenture, then and in that case all property, rights and interests hereby conveyed or assigned or pledged, or by any deed, conveyance or other instrument in writing, conveyed or assigned or pledged to the Trustees or either of them, to be held upon the trusts and provisions of this indenture, shall revert to the Railway Company, and the estate, right, title and interest of the Trustees shall thereupon cease, determine and become void, and the Trustees in such case, on demand of the Railway Company, and at its cost and expense, shall enter satisfaction of this indenture upon the record; otherwise the same shall be, continue and remain in full force and virtue.

Article Eleventh.

Section 1. All the covenants, stipulations, promises and agreements in this indenture contained by or in behalf of the Railway Company, shall bind its successors and assigns, whether so expressed or not.

Section 2. Nothing in this indenture shall prevent the Railway Company from taking over the property of any company.

Section 3. Nothing in this indenture shall prevent the consolidation or merger with or into the Railway Company of any company, or prevent any consolidation or merger of the Railway Company with or into any other company, or prevent the sale by the Railway Company of its property as an entirety; provided, that any such consolidation or merger shall be on such terms as to preserve and not to impair the lien or security under this indenture, or any of the rights and powers of the Trustees or of the holders of the First Terminal and Unifying Mortgage Bonds, and that any successor corporation formed by such consolidation, or the corporation into which the Railway Company shall be merged, shall, as a part of such consolidation or merger, expressly assume the due and punctual payment of the principal and interest of all the First Terminal and Unifying Mortgage Bonds, and the observance and performance of all the covenants and conditions of this indenture; and provided

SUNDY PROVISIONS.

Successors and assigns of Railway Company bound.

Railway Company permitted hereunder to acquire property of other companies.

Consolidation or merger or sale permitted.

Conditions of consolidation or merger or sale.

that, as a condition of any such sale of the property of the Railway Company as an entirety, the corporation to which such property shall be sold as an entirety shall, as a part of the purchase price thereof, assume the due and punctual payment of the principal and interest of all the First Terminal and Unifying Mortgage Bonds and the observance and performance of all the covenants and conditions of this indenture, and shall, simultaneously with the delivery to it of such conveyance, execute and deliver a proper indenture to the Trustees, in form satisfactory to the Trust Company, whereby such purchasing corporation shall so assume the due and punctual payment of the principal and interest of all the First Terminal and Unifying Mortgage Bonds and the observance and performance of all the covenants and conditions of this indenture.

Section 4. In case any company shall be consolidated or merged with or into the Railway Company as aforesaid, or in case the Railway Company shall be so consolidated or merged with or into any other corporation, or in case of sale of the property of the Railway Company as an entirety, the corporation formed by such consolidation or into which the Railway Company shall have been merged, or to which such sale shall have been made, upon executing and causing to be recorded an indenture with the Trustees in form satisfactory to the Trust Company whereby such corporation shall assume the due and punctual payment of the principal and interest of all the First Terminal and Unifying Mortgage Bonds and the observance and performance of all the covenants and conditions of this indenture, shall succeed to and be substituted for the Railway Company, with the same effect as if it had been named herein as the party of the first part hereto; and such corporation may thereupon cause to be signed and may issue, either in its own name or in the name of the Railway Company, any or all of the First Terminal and Unifying Mortgage Bonds which shall not theretofore have been signed by the Railway Company and delivered to the Trust Company for authentication, and the Trust Company, upon the order of such corporation, in lieu of the Railway Company, subject to all the terms, conditions and restrictions herein prescribed, shall authenticate any and all bonds which shall have been previously signed by the officers of the Railway Company and delivered to the Trust Company for authentication.

Successor
corporation to
be substituted
for Railway
Company.

Issue of bonds
by successor
corporation.

tication, and any of such bonds which such corporation shall thereafter cause to be signed and delivered to the Trust Company for that purpose. All bonds so issued shall in all respects have the same legal rank and security as the bonds theretofore or thereafter issued in accordance with the terms of this indenture, as though all of said bonds had been actually issued by the Railway Company as of the date of the execution hereof.

For every purpose of this indenture, including the execution, issue and use of any and all the First Terminal and Unifying Mortgage Bonds, the term Railway Company includes and means not only St. Louis Southwestern Railway Company, but also any such successor corporation. Every such successor corporation shall possess, and from time to time may exercise, each and every right and power hereunder of St. Louis Southwestern Railway Company in its name or otherwise, and any act or proceeding by any provision of this indenture required to be done or performed by any board or officer of the Railway Company may be done and performed with like force and effect by the like board or officer of any corporation that shall at any time be such lawful successor of the Railway Company.

Meaning of
term "Railway
Company."

Section 5. In order to facilitate the record of this indenture, the same may be simultaneously executed in several counterparts, each of which so executed shall be deemed to be an original; and such counterparts shall together constitute but one and the same instrument.

Execution in
counterparts.

Article Twelfth.

PARTIES IN
INTEREST.

Nothing in this indenture expressed or implied, is intended, or shall be construed, to confer upon, or to give to, any person or corporation, other than the parties hereto and the holders of First Terminal and Unifying Mortgage Bonds, any right, remedy or claim, under or by reason of this indenture or any covenant, condition or stipulation hereof; and all the covenants, stipulations, promises and agreements in this indenture contained by or on behalf of the Railway Company shall be for the sole and exclusive benefit of the parties hereto and of the holders of First Terminal and Unifying Mortgage Bonds.

In Witness Whereof, St. Louis Southwestern Railway Company and Guaranty Trust Company of New York have caused their respective corporate seals to

Testimonium.

be hereunto affixed and this indenture to be signed by their respective Presidents or Vice-Presidents and by their respective Secretaries or Assistant Secretaries, and said Walker Hill, one of the parties of the second part, has hereunto set his hand and seal, the day and year first above writter.

**ST. LOUIS SOUTHWESTERN
RAILWAY COMPANY.**

By F. H. Britton, President.

Attest:

Arthur J. Trussell,
(Seal) Secretary.

**GUARANTY TRUST COM-
PANY OF NEW YORK.**

By A. J. Hemphill, President.

(Seal)

Attest:

E. C. Hebbard,
Secretary.

WALKER HILL.

Signed, sealed and delivered on
behalf of St. Louis Southwestern
Railway Company in the presence
of:

P. J. Longua
Lawrence Greer

Signed, sealed and delivered on
behalf of Guaranty Trust Com-
pany of New York in the pres-
ence of:

William H. Taylor
Otis K. Hutchinson

Signed, sealed and delivered by
Walker Hill in the presence of:

J. C. Paulus
J. H. W. Brune

State of New York,
County of New York,—ss.:

Be It Remembered, that on this the
day of April, 1912, before me, the undersigned, a Not-
ary Public, duly commissioned and acting within and
for said County and State, personally came and ap-

peared F. H. Britton, to me well and personally known and personally known to me to be the President of St. Louis Southwestern Railway Company, and to be the person whose name is subscribed to the foregoing instrument as President of St. Louis Southwestern Railway Company, who, having by me been duly sworn, did depose and say that he resided in St. Louis, State of Missouri, and is the President of St. Louis Southwestern Railway Company, one of the corporations described in and which executed the foregoing instrument, and that the seal affixed to the said instrument is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors, and the said F. H. Britton acknowledged said instrument to be the free act and deed of said corporation, and he further acknowledged to me that St. Louis Southwestern Railway Company and he, in his official capacity as President of said Company, had executed the foregoing instrument for purposes and considerations therein mentioned and set forth; and the said F. H. Britton, in the presence of two attesting, competent witnesses, P. J. Longua and Lawrence Greer, acknowledged to me and declared that he, as such President of St. Louis Southwestern Railway Company, had signed the foregoing act of mortgage and now recognizes and acknowledges the signature of said corporation by him as genuine, and he further acknowledged and declared that he knew the seal of said corporation, and that the seal attached to the foregoing instrument is the genuine corporate seal of said Company, and that the same was affixed thereto by order of the Board of Directors of said Company; and on the same day also personally appeared before me Arthur J. Trussell to me personally well known and personally known to me to be the Secretary of said Company and to be the person whose name is subscribed to the foregoing instrument as Secretary of St. Louis Southwestern Railway Company, and he acknowledged to me that he had affixed the corporate seal of said Company to said instrument and signed his name thereto as Secretary by order of the Board of Directors of said Company, and that as such Secretary he had executed the same as the free act and deed of said Company, and that the said Company had executed the same for the purposes and considerations therein mentioned and set forth.

In Witness Whereof I have hereunto set my hand and official seal at the City of New York, aforesaid, this, the 24th day of April, A. D. 1912.

My commission expires March 30, 1913.

(Notarial Seal)

H. L. UTTER,
Notary Public, Kings County.
Certificate filed in New York County.

State of New York,
County of New York—ss.:

Be it remembered that on this the 24th day of April, 1912, before me, the undersigned, a Notary Public, duly commissioned and acting within and for said County and State, personally came and appeared A. J. Hemphill, to me well and personally known, and personally known to me to be the President of the Guaranty Trust Company of New York and to be the person whose name is subscribed to the foregoing instrument as President of the Guaranty Trust Company of New York, who, having by me been duly sworn, did depose and say that he resided in Spring Lake, State of New Jersey, and is the President of the Guaranty Trust Company of New York, one of the corporations described in and which executed the foregoing instrument, and that the seal affixed to the said instrument is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors, and the said A. J. Hemphill acknowledged said instrument to be the free act and deed of said corporation, and he further acknowledged to me that the Guaranty Trust Company of New York and he, in his official capacity as President of said Company, had executed the foregoing instrument for purposes and considerations therein mentioned and set forth; and the said A. J. Hemphill, in the presence of two attesting, competent witnesses, William H. Taylor and Otis K. Hutchinson, acknowledged to me and declared that he, as such President of the Guaranty Trust Company of New York, had signed the foregoing act of mortgage and now recognizes and acknowledges the signature of said corporation by him as genuine, and he further acknowledged

and declared that he knew the seal of said corporation, and that the seal attached to the foregoing instrument is the genuine corporate seal of said Company, and that the same was affixed thereto by order of the Board of Directors of said Company; and on the same day also personally appeared before me E. C. Hebbard, to me personally well known and personally known to me to be the Secretary of said Company, and to be the person whose name is subscribed to the foregoing instrument as Secretary of the Guaranty Trust Company of New York, and he acknowledged to that he had affixed the corporate seal of said Company to said instrument and signed his name thereto as Secretary by order of the Board of Directors of said Company, and that as such Secretary he had executed the same as the free act and deed of said Company, and that the said Company had executed the same for the purposes and considerations therein mentioned and set forth.

In witness whereof, I have hereunto set my hand and official seal at the City of New York, aforesaid, this, the 24th day of April, A. D. 1912.

B. G. SMITH,

[Notarial Seal]

Notary Public,

Kings County, No. 147, Register's No. 5038

Certificate filed in N. Y. County, No. 127,

Register's No. 4300.

Commission expires March 30, 1914.

State of Missouri,

City of St. Louis—ss:.

On this day, before me, the undersigned Notary Public, duly commissioned and acting within and for said City and State, personally appeared Walker Hill, to be known and known to me to be the person described in and who executed the foregoing instrument as Trustee, and acknowledged that he executed the same as his free act and deed, and for the purposes and considerations therein mentioned and set forth, and in the presence of two attesting competent witnesses, J. C. Paulus and J. H. W. Brune, declared that he had signed the foregoing act of mortgage and now recognizes and acknowledges his signature thereto as genuine.

In testimony whereof I have hereunto set my hand and official seal at the City of St. Louis aforesaid, this the 27th day of April, A. D., 1912.

My commission expires July 11th, 1914.

[Notarial Seal]

RHODES E. CAVE,
Notary Public,
City of St. Louis, Mo.

Supplement to Proof of Claim of Guaranty Trust Company of New York as Trustee Under Mortgage Dated January 1, 1912, of St. Louis Southwestern Railway Company Securing First Terminal and Unifying Mortgage Bonds.

(Filed March 15, 1937.)

In the District Court of the United States, Eastern Division, Eastern Judicial District of Missouri.

In the Matter of

St. Louis Southwestern Railway Company, Debtor.

In Proceedings for Reorganization of a Railroad.

No. 8497.

United States of America,

Southern District of New York,

City, County and State of New York—ss.

At the City of New York, in the Southern District of New York, on the 12th day of March, 1937, came Henry A. Theis of 62 North Woodland Street, Englewood, New Jersey, and made oath and says as follows:

Whereas Guaranty Trust Company of New York (hereinafter sometimes referred to as the "Claimant"), as Trustee under the First Terminal and Unifying Mortgage dated January 1, 1912 (hereinafter sometimes called the "Mortgage"), made and executed on September 24, 1936, and filed herein, proof of claim with respect to bonds issued and outstanding under said Mortgage (hereinafter sometimes called the "bonds"), all as more fully set out in said proof of claim, reference to which is hereby made with the same effect as if fully incorporated herein and made a part hereof; and

Whereas, at the time said proof of claim was executed and made the Claimant was enjoined from accelerating the maturity of the bonds pursuant to the terms of the Mortgage; and

Whereas, by order herein dated February 24, 1937, the aforesaid injunction was dissolved and, pursuant to said

order, Claimant on February 25, 1937, declared the principal of all of the bonds outstanding under said Mortgage due and payable immediately on May 5, 1936, such declaration being effective as of the date last named; and

Whereas, by order herein dated February 26, 1937, the court granted leave to Claimant to file an amended claim or claims as therein more fully provided; and

Whereas, Berryman Henwood, as Trustee of the Debtor, and Claimant have, for the purposes of the aforesaid proof of claim of the Claimant and any amendment thereof as aforesaid, stipulated that the exchange value of the guilder in terms of the dollar was, and is to be taken as, \$.6778 on each of the following dates, on which the following happened, to wit: the date on which the initial petition (Petition No. 1) was filed in these proceedings and on which Order No. 1 was entered, inter alia approving said petition as properly filed, viz., December 12, 1935; the effective date of the aforesaid declaration as of which all of the bonds were declared immediately due and payable, viz., May 5, 1936; and the date on which demand, and protest of nonpayment, were made in Amsterdam, Holland, by or in behalf of Claimant, for the payment in guilders of the principal and interest of the bonds for which proof of claim was filed as aforesaid and on which Claimant made and executed its proof of claim aforesaid, viz., September 24, 1936.

Now, Therefore, Claimant files this supplement to its proof of claim aforesaid, which proof of claim continues in full force and effect and is in no way altered except as supplemented and made more definite hereby, viz.:

Each of the statements of fact set out in the above Whereas clauses is hereby affirmed and stated as a fact.

The Debtor, at and before each of the dates mentioned in the last Whereas clause above, was and still is justly and truly indebted to the Claimant in the sum of \$1,687.722 in money of the United States of America in respect of each 2490 guilders principal amount of said bonds, and in the sum of \$37.739 for the interest accrued and unpaid from July 1, 1935, to December 12, 1935, in respect of each 2490 guilders principal amount of said bonds; making a total of \$1,725.461 for principal and interest from July 1, 1935, to December 12, 1935, in respect of each 2490 guilders principal amount of said bonds; so that the total amount which was on December 12, 1935, and still is, justly and truly owing by the Debtor to the Claimant for principal and interest on all the bonds outstanding under the said Mortgage was \$37,335,525.12. Said amount does not include interest accruing subsequent

to December 12, 1935, nor amounts for compensation to the Claimant as Trustee and expenses and liabilities of the Trustee and other sums which the Debtor is obligated to pay and payment of all of which is or will be secured by the Mortgage; all of the rights of Claimant and bondholders with respect to which are hereby reserved.

This proof of claim is made for all bonds issued and outstanding under said Mortgage, but the amount of this proof of claim shall be reduced to the extent that valid individual proofs of claim are filed on behalf of said bonds or coupons by the holders thereof, personally or by proxy, and by the amount by which the value of guilders exceeds the value of any money other than guilders which any holder or holders of said bonds or coupons validly elect to receive in respect thereof.

HENRY A. THEIS,

Vice-President of Claimant Guaranty Trust Company
of New York as Trustee aforesaid.

Subscribed and sworn to before me this 12th day of March,
1937.

W. J. BURNHAM.

W. J. Burnham

(Seal)

Notary Public, New York County.

N. Y. Co. Clerk's No. 346, Reg. No. 8-B-90.

Queens Co. Clerk's No. 658, Reg. No. 2930.

Kings Co. Clerk's No. 274, Reg. No. 8416.

Nassau Co. Clerk's No. 8-B-29.

Certificate filed in Westchester Co.

Commission Expires March 30, 19.....

Filed Mar. 15, 1937. Jas. J. O'Connor, Clerk.

Protest of Berryman Henwood, Trustee, St. Louis Southwestern Railway Company, Debtor, to Proof of Claim and Supplement Thereto Filed by Guaranty Trust Company of New York, as Trustee Under Mortgage Dated January 1, 1912, of St. Louis Southwestern Railway Company Securing First Terminal and Unifying Mortgage Bonds.

(Filed May 8, 1937.)

Comes now Berryman Henwood, Trustee, St. Louis Southwestern Railway Company, Debtor, and protests proof of claim and supplement thereto filed by Guaranty Trust Company of New York, as Trustee under a certain mortgage.

dated January 1, 1912, of St. Louis Southwestern Railway Company securing First Terminal and Unifying Mortgage Bonds, being proof of claim No. 251 and supplement thereto, filed herein on September 30, 1936, and March 15, 1937, respectively (and appearing at pages 1147 and 1939 of the Printed Record), and for protest, objection and exceptions thereto, Trustee avers, on information and advice of counsel:

1. That said Debtor is not indebted to said Claimant or to the holders of said bonds in the sum of 53,878,620 guilders (as claimed in said Claimant's proof of claim) or any other amount of guilders, or in the sum of \$37,335,525.12 (as claimed in said Claimant's supplement to proof of claim); that the provisions in certain of the bonds and interest coupons issued under said First Terminal and Unifying Mortgage that payment will be made, at the option of the holders of said bonds and coupons, at the Borough of Manhattan, City and State of New York, or in London, England, or in Amsterdam, Holland, or in Berlin, Germany, or in Paris, France, and that such payment shall consist of dollars in gold coin of the United States of America, of or equal to the standard of weight and fineness as it existed January 1, 1912, or pounds or guilders or marks or francs, respectively (reference being hereby made to said provisions, as set forth in said mortgage, for a particular description of said provisions, with the same force and effect as if said provisions were herein set forth at length) are contrary to the law and public policy of the United States and are wholly void and of no effect, by reason of the Joint Resolution of Congress, approved June 5, 1933 (Public Resolution No. 10 of the 73d Congress; 31 USCA, Section 463; 48 Stat. 113), and, notwithstanding the said multiple currency provisions contained in certain of said bonds and coupons, the claim on said obligations should be based, under the terms of said Joint Resolution, upon a liability to discharge the same by payment, dollar for dollar, in any coin or currency of the United States which at the time of payment is legal tender for public and private debts, and in this respect

Trustee alleges that the said bonds were issued and sold by the St. Louis Southwestern Railway Company within the United States and payment therefor was received in money of the United States in amounts less than the face amount of said bonds as expressed in United States money; that said obligations are payable in United States money and evidence a United States money debt and not a transaction in guilders or other foreign moneys; and protestant alleges further that at all times since the institution of this proceeding and prior to September 27, 1936, as well as at the time of the issuance

and sale of said bonds, the guilder was the gold monetary unit of Holland, and it was in fact and was provided by the laws of Holland to be the equivalent of .672 grams of gold nine-tenths fine, and that to allow the claim of the Guaranty Trust Company of New York herein as filed would be to allow recovery of an amount in money of the United States measured by gold; and would be tantamount to allowing the claim for the value of the gold coin of the United States of America, of or equal to the standard of weight and fineness as it existed January 1, 1912, stipulated in the bonds and coupons; and that said proof of claim and supplement thereto should be amended so that the claim under said mortgage shall be for \$21,596,000 principal amount, and interest at the rate of 5% per annum from July 1, 1935, to December 12, 1935 (said principal amount being \$42,000 less than the aggregate principal amount of bonds issued under said mortgage for the reason that bonds in the aggregate principal amount of \$42,000 were pledged in certain annuity trusts and have been returned to and are now held by the Debtor, and claimant's proof of claim should not cover said bonds), subject to recalculation to the extent that valid individual proofs of claim are filed and may be allowed on behalf of said bonds or coupons by the holders thereof; and

In the alternative (in the event that it shall be finally determined that said multiple currency provisions of said mortgage are not void by reason of said Joint Resolution of Congress, and that said provisions are binding upon said Debtor), Trustee avers, on information and advice of counsel:

2. That in any event, as to such of said bonds and coupons as on December 12, 1935, were held by domestic holders or alien holders who received such bonds and coupons on or after December 12, 1935, said Debtor is not indebted to said Claimant or to the holders of said bonds and coupons in guilders or in the dollar equivalent of guilders, and that as to such domestic holders or alien holders who received such bonds and coupons on or after December 12, 1935, the multiple currency provisions of said mortgage are void and of no effect by reason of said Joint Resolution of Congress, approved June 5, 1933; and on information and belief, that said bonds and appurtenant interest coupons which remain outstanding are, or were on December 12, 1935, owned and held largely by citizens and residents of the United States of America or by domestic corporations, incorporated under the laws thereof or of the states thereof; and on information and belief, that at the time said bonds and appurtenant interest coupons were issued, a comparatively small portion of the total issue was sold by the investment bankers who had

underwritten the sale of the bonds to investors in any foreign countries, and that no payments were made in Holland at any time, and that the said multiple currency provisions were inserted in said bonds and coupons so that payment of the principal and interest of said bonds and coupons could be made to holders of said bonds and coupons who are bona fide citizens and residents of said foreign countries in the respective currencies of said foreign countries and in the respective amounts as stated in said bonds and coupons, as set out in Paragraph 1 of this protest; that holders of said bonds and coupons who are citizens and residents of the United States and holders of said bonds and coupons who are citizens and residents of Holland and who received such bonds and coupons on or after December 12, 1935, did not have and do not have at present any right to demand payment in, or to base claims for payment on, the currency of Holland or in such currency in terms of United States currency.

3. That the alleged option of any holders of said bonds or coupons whose option may be held not to have been invalidated by said Joint Resolution of Congress, approved June 5, 1933, to claim an indebtedness in guilders or guilders in terms of dollars was lost to said holders by failure to exercise the same as to coupons on or before the coupon maturity date, and as to bonds on or before the effective date of the declaration by Claimant as of which all of the bonds were declared immediately due and payable, viz., May 5, 1936; and said alleged option having lapsed, the Debtor St. Louis Southwestern Railway Company and your Trustee have elected and do hereby elect to require claims based on said bonds and coupons to be based upon payment in United States money which at the time of payment is legal tender for public and private debts, and as a result of the loss of said alleged option to said holders and the said election to pay in United States money, the obligation under said bonds and coupons is an obligation for payment in United States money only, in the face amount of said bonds and coupons.

4. That the temporary bonds and registered bonds issued under said mortgage and mentioned in said Claimant's proof of claim (at page 1150 of the Printed Record) do not bear said multiple currency provisions, and therefore any such bonds not exchanged prior to December 12, 1935, for coupon bonds issued under said mortgage and mentioned in said Claimant's proof of claim (at page 1149 of the Printed Record), and which are now outstanding, entitle the holders thereof (for whatever value, if any, that claims on pledged securities may have and to whatever extent, if any, that the filing of claims based on such securities may be necessary)

to file proofs of claim only in the aggregate principal amount of \$13,533,000, and not for any amount of guilders or in the sum of \$1,687.722 in respect of each \$1,000 bond, or in the sum of \$37.739 in respect of each \$25 coupon, to which the holders might have been entitled under the mortgage prior to December 12, 1935. Bonds of this character in the aggregate principal amount of \$23,000 were pledged in certain annuity trusts and have been returned to and are now held by the Debtor; and Claimant's proof of claim should not cover said bonds. The only bonds issued under said mortgage which bear said multiple currency clauses are the coupon bonds issued thereunder, being 8,082 bonds in the aggregate principal amount (in money of the United States) of \$8,082,000, but coupon bonds in the aggregate principal amount of \$19,000 were pledged in certain annuity trusts and have been returned to and are now held by the Debtor, and Claimant's proof of claim should not cover said bonds; that subsequent to December 12, 1935, tender was made on behalf of certain holders of temporary bonds and registered bonds of said bonds for cancellation in exchange for coupon bonds, but that said Debtor and the Debtor's Trustee declined to accept the same or to deliver coupon bonds to said holders; and that said proof of claim and supplement thereto should be amended accordingly, except as to bonds and coupons covered by valid individual proofs of claim, and which are not to be considered as a part of Claimant's proof of claim.

5. That in any event, said Guaranty Trust Company of New York, as such Trustee, has no right under the terms of the bonds or coupons or said mortgage or under amendatory Section 77 of the Bankruptcy Act to make an election on behalf of the holders of any or all of said bonds or coupons to claim an indebtedness in guilders or guilders in terms of dollars, or in any other of the several moneys mentioned in said mortgage, such election being reserved by the terms of the bonds, coupons and the mortgage to the holders of the bonds and coupons (reference being hereby made to said provisions, as set forth in said mortgage, for a particular description of said provisions, with the same force and effect as if said provisions were herein set forth at length), and that to the extent that said proof of claim and supplement thereto purport to make such election for holders of any of said bonds or coupons who have not individually made such election by making known, in accordance with the provisions of the bonds, coupons and the mortgage, the proper, timely and lawful exercise of said alleged option, said proof of claim and supplement thereto should be stricken from the record as improperly filed or, in lieu thereof, should be amended so as to set forth a claim on behalf of holders of

bonds and coupons in the aggregate amount of their bonds in money of the United States of America at the rate of \$1,000 instead of \$1,687.722 in respect of each \$1,000 bond, and at the rate of \$25 instead of \$37.739 in respect of each \$25 coupon.

6. That (in the event that it shall be finally determined that said Claimant had and has a right under the terms of the bonds, coupons and the mortgage and under amendatory Section 77 of the Bankruptcy Act to make an election in behalf of the holders of any or all of said bonds or coupons to claim an indebtedness in guilders or guilders in terms of dollars, as set forth in said proof of claim and supplement thereto) as to any of said bonds and coupons concerning which it may be finally determined that said Claimant properly claimed an indebtedness based upon guilders, the exchange value of the guilder in terms of the dollar should not be fixed as of any one of the following dates, on which the following happened, to-wit: The date on which the initial petition (Petition No. 1) was filed in these proceedings and on which Order No. 1 was entered, inter alia approving said petition as properly filed, viz., December 12, 1935; the effective date of the declaration by Claimant as of which all of the bonds were declared immediately due and payable, viz., May 5, 1936; or the date on which demand, and protest of nonpayment, were made in Amsterdam, Holland, by or in behalf of Claimant, for the payment in guilders of the principal and interest of the bonds for which proof of claim was filed as aforesaid and on which Claimant made and executed its proof of claim aforesaid, viz., September 24, 1936. Trustee avers that in such event, the value of the guilder having depreciated since the dates mentioned, the exchange value of the guilder in terms of the dollar should be fixed as of the judgment day, in accordance with the "judgment day rule" announced by the Supreme Court of the United States, and that said day will be the day on which the claim of Claimant, or such portion thereof as may be proper, or as it may be properly amended, is allowed by this Court; and that said proof of claim and supplement thereto should be amended accordingly.

7. That, in addition to the objections, exceptions and amendments suggested above, and in any event, said proof of claim and supplement thereto should be reduced to the extent that valid individual proofs of claim are filed on behalf of said bonds or coupons by the holders thereof, personally or by proxy, and by the amount by which the value of guilders exceeds the value of any money other than guilders which any holder or holders of said bonds or coupons validly

elect to receive in respect thereof, in the event it shall be finally determined that said Claimant had and has the right to exercise the alleged guilder option aforesaid for bondholders not making an individual election.

All rights of the Trustee and the Debtor in respect of said claim are hereby expressly reserved, including the right to amend this protest and to make more definite any part hereof.

Wherefore, Trustee prays that the Court enter an order requiring that said proof of claim and supplement thereto be amended in accordance with the suggestions set forth herein, or in lieu thereof that the claim be partially denied in accordance herewith and partially allowed in accordance herewith, depending upon the determination which may be made of the several issues presented by the protest, objections and exceptions contained herein.

BERRYMAN HENWOOD,

Trustee,

St. Louis Southwestern Railway Company,
Debtor,

By A. H. KISKADDON,

General Counsel.

CARLTON S. HADLEY,

Assistant General Counsel.

Dated May 8, 1937.

Filed May 8, 1937. Jas. J. O'Connor, Clerk.

Protest of St. Louis Southwestern Railway Company to
Proof of Claim and Supplement Thereto Filed by
Guaranty Trust Company of New York, as Trustee
Under Mortgage Dated January 1, 1912, of St. Louis
Southwestern Railway Company Securing First Ter-
minal and Unifying Mortgage Bonds.

(Filed May 14, 1937.)

Comes now St. Louis Southwestern Railway Company and protests proof of claim and supplement thereto filed by Guaranty Trust Company of New York, as Trustee under a certain mortgage dated January 1, 1912, of St. Louis Southwestern Railway Company securing First Terminal and Unifying Mortgage bonds, being proof of claim No. 251 and supplement thereto, filed herein on September 30, 1936, and March 15, 1937, respectively (and appearing at pages 1147

and 1939 of the Printed Record), and adopts as its protest, objection and exceptions thereto the protest thereto heretofore filed by Berryman Henwood, Trustee, St. Louis Southwestern Railway Company, Debtor, reference being hereby made to said protest with the same force and effect, as if its provisions were herein set forth at length.

Wherefore, protestant prays that the Court enter an order requiring that said proof of claim and supplement thereto be amended in accordance with the suggestions set forth in said Trustee's protest, or in lieu thereof that the claim be partially denied in accordance therewith, and partially allowed in accordance therewith, depending upon the determination which may be made of the several issues presented by the said protest, hereby adopted by this protestant as its own.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY,

By F. C. Nicodemus, Jr.,

General Counsel

Dated May 11, 1937.

Filed May 14, 1937. Jas. J. O'Connor, Clerk.

Protest of Southern Pacific Company, Creditor and Stockholder of St. Louis Southwestern Railway Company, Debtor, to Proof of Claim and Supplement Thereto Filed by Guaranty Trust Company of New York, as Trustee Under Mortgage Dated January 1, 1912, of St. Louis Southwestern Railway Company Securing First Terminal and Unifying Mortgage Bonds.

(Filed May 14, 1937.)

Comes now Southern Pacific Company, a Kentucky corporation, a stockholder in the Debtor, owning 193,134 shares of preferred stock and 130,834 shares of common stock thereof, also a creditor of the Debtor, owning a promissory note thereof in the principal amount of \$17,882,250, secured by the pledge of collateral consisting of \$23,903,000, principal amount, of St. Louis Southwestern Railway Company General and Refunding Mortgage 5% Gold Bonds, Series "A", and \$474,000, principal amount, of Southern Illinois and Missouri Bridge Company First Mortgage 4% Bonds, proof of claim therefor having been duly filed herein as Claim No. 91 and 91-A, and a party in interest in respect to the claim of the Guaranty Trust Company of New York, and protests

proof of claim and supplement thereto filed by Guaranty Trust Company of New York, as Trustee, under a certain mortgage dated January 1, 1912, of St. Louis Southwestern Railway Company, securing First Terminal and Unifying Mortgage Bonds, being proof of claim No. 251 and supplement thereto, filed herein on September 30, 1936, and March 15, 1937, respectively (appearing at pages 1147 and 1939 of the printed record), and for protest, objection and exceptions thereto, Southern Pacific Company avers:

1. That said Debtor is not indebted to said claimant or to the holders of said bonds secured thereby in the sum of 53,878,620 guilders (as claimed in said claimant's proof of claim), or any other amount of guilders, or in the sum of \$37,335,525.12 (as claimed in said claimant's supplement to proof of claim), or in any amount in excess of the principal amount as expressed in United States money of said bonds outstanding, viz., \$21,596,000; together with interest from July 1, 1935 to December 12, 1935; that the provisions in certain of the bonds and interest coupons issued under said First Terminal and Unifying Mortgage that payment will be made, at the option of the holders of said bonds and coupons, at the Borough of Manhattan, City and State of New York, or in London, England, or in Amsterdam, Holland, or in Berlin, Germany, or in Paris, France, and that such payment shall consist of dollars in gold coin of the United States of America, of or equal to the standard of weight and fineness as it existed January 1, 1912, or pounds or guilders or marks or francs, respectively (reference being made to said provisions, as set forth in said mortgage, for a particular description thereof, with the same force and effect as if said provisions were herein set forth at length), are contrary to the law and public policy of the United States and are wholly void and of no effect, by reason of the Joint Resolution of Congress, approved June 5, 1933 (48 Stat. 113; 31 U. S. C., Sec. 463) and, notwithstanding the said multiple currency provisions contained in certain of said bonds and coupons, the claim on said obligations should be based, under the terms of said Joint Resolution, upon the liability to discharge the same by payment, dollar for dollar, in any coin or currency of the United States which at the time of payment is legal tender for public and private debts.

In this respect, Southern Pacific Company alleges that the said bonds were issued and sold by the St. Louis Southwestern Railway Company within the United States and payment therefor was received in money of the United States in amounts less than the face amounts of said bonds as expressed in United States money; that said obligations are

payable in United States money and evidence a United States money debt and not a transaction in guilders or other foreign moneys; that the primary obligation of said bonds and coupons was for the payment of United States gold coin of the standard of weight and fineness existing on January 1, 1912, and the amounts of foreign moneys mentioned in the said bonds and coupons were intended and were specified to be the equivalent of such gold coin, all of which appears from Article One, Section 4 of the said mortgage, reading as follows:

"All or any of the coupon bonds issued hereunder from time to time shall be payable at the office or agency of the Railway Company in the Borough of Manhattan in the City and State of New York, or, at the option of the holders of said coupon bonds, in the cities and countries, respectively, and in the respective currencies stated in the form of coupon bond hereinbefore set forth, but the face amount of each of such coupon bonds shall be \$1,000 in United States gold coin of the standard of weight and fineness existing on January 1, 1912, or the equivalent thereof, calculated at the rates of exchange stated in the form of coupon bond hereinbefore set forth.";

and protestant alleges further that at all times since the institution of this proceeding, and prior to September 27, 1936, as well as at the time of the issuance and sale of said bonds, the guilder was the gold monetary unit of Holland, and it was in fact and was provided by the laws of Holland to be the equivalent of .672 grams of gold nine-tenths fine, and that to allow the claim of the Guaranty Trust Company herein as filed would be to allow recovery of an amount of money of the United States measured by gold, and would be tantamount to allowing the claim for the value of the gold coin of the United States of America, of or equal to the standard of weight and fineness as it existed on January 1, 1912, stipulated in the bonds and coupons; and that said proof of claim and supplement thereto should be amended so that the claim under said mortgage shall be for \$21,596,000, principal amount, with interest at the rate of 5% per annum from July 1, 1935 to December 12, 1935, subject to reduction to the extent that valid individual proofs of claim are filed and may be allowed on behalf of said bonds and coupons by the holders thereof;

2. That in any event, as to such of said bonds and coupons as on December 12, 1935 were held by domestic holders, or by alien holders who received such bonds and coupons on or after June 5, 1933, said Debtor is not indebted to said claimant or the holders of said bonds and coupons in guilders or

in the dollar equivalent of guilders, and that as to such domestic holders or alien holders who received such bonds and coupons on or after June 5, 1933, the multiple currency provisions of said mortgage are void and of no effect by reason of the Joint Resolution of Congress of June 5, 1933; and on information and belief, that said bonds and appurtenant interest coupons which remain outstanding are, and were on December 12, 1935, owned and held largely by citizens and residents of the United States of America or by domestic corporations incorporated under the laws thereof or of the states thereof; and on information and belief, that at the time said bonds and appurtenant interest coupons were issued, a comparatively small portion of the total issue was sold by the investment bankers who had underwritten the sale of the bonds to investors in foreign countries, and that no payments were made in Holland at any time, and that the said multiple currency provisions were inserted in said bonds and coupons so that payment of the said principal and interest of said bonds and coupons could be made to the holders of said bonds and coupons who were bona fide citizens and residents of said foreign countries in the respective currencies of said foreign countries and in the respective amounts as stated in said bonds and coupons; that holders of said bonds and coupons who are citizens and residents of the United States and holders of said bonds and coupons who are not citizens and residents of the United States and who acquired such bonds and coupons from United States residents on or after June 5, 1933, did not have and do not have at present any right to demand payment in, or to base claims for payment on, the number of guilders specified in said bonds and coupons as the equivalent of United States gold coin of the standard of weight and fineness existing on January 1, 1912;

3. That Southern Pacific Company is a holder as pledgee of \$23,903,000, face amount, St. Louis Southwestern Railway Company General and Refunding Mortgage 5% Gold Bonds, by which bonds the Debtor promised to pay to the holders thereof the face amount thereof, together with interest thereon, in gold coin of the United States of America of or equal to the standard of weight and fineness as it existed on the first day of July, 1930; that by reason of said provision contained in said obligations, the holder of said bonds was protected by the contract of the Debtor against loss resulting from reduction of the gold content of the United States dollar; that the protection thus afforded to the holders of the said General and Refunding Bonds, by the contract of the Debtor, against depreciation in the value of the United States

dollar was as full, complete and adequate as the protection afforded to the holders of the St. Louis Southwestern Railway Company First Terminal and Unifying Bonds, by the provisions contained in those bonds as above set forth, against such depreciation; that protestant is in all respects similarly situated to the holders of the First Terminal and Unifying Mortgage Bonds, and particularly the holders thereof who are citizens, residents or nationals of the United States of America, and it, as well as other such domestic bondholders, must receive income and meet expenses and obligations in the money of the United States of America constituting legal tender at the time of receipt or payment; that if the claims of the holders of the First Terminal and Unifying Mortgage Bonds or the claim of the Guaranty Trust Company of New York in their behalf be allowed in an amount in excess of the face amount of their said bonds and coupons as expressed in United States money, such additional allowance would be largely at the expense and to the damage of this protestant and of other holders of the Debtor's General and Refunding Mortgage Gold Bonds; that if the said Joint Resolution of Congress of June 5, 1933, should be interpreted to render invalid the provisions contained in the said General and Refunding Mortgage Gold Bonds for payment in gold coin of the United States of America of the standard of weight and fineness existing on July 1, 1930 and not to render invalid or ineffective the above set forth provisions of the First Terminal and Unifying Bonds for payment in United States gold coin, or, at the option of the holder, in specified foreign moneys, intended as the equivalent of such gold coin, and should cause or permit the claims in behalf of the holders of said First Terminal and Unifying Mortgage Bonds to be enhanced by reason of the said multiple currency provision, at the cost and expense of the holders of the General and Refunding Bonds, the said Joint Resolution of Congress of June 5, 1933, as so interpreted and applied, would be arbitrary, capricious, and would discriminate without reasonable basis, against the holders of General and Refunding Mortgage Bonds, containing gold clauses, and in favor of the holders of First Terminal and Unifying Bonds, containing the said multiple currency provision, and would deny to this protestant and to other holders of the said General and Refunding Bonds the equal protection of the laws and it and they would be deprived of property without due process of law in contravention of the Fifth Amendment to the Constitution of the United States of America;

4. That the alleged option of any holders of said First Terminal and Unifying Mortgage Bonds or coupons to claim

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an indebtedness in guilders or guilders in terms of dollars was lost to said holders by failure to exercise the same as to coupons on or before the coupon maturity date, and as to bonds on or before the effective date of the declaration by claimant as of which all of the bonds were declared immediately due and payable, viz., May 5, 1936; and, upon the lapse of said alleged option, the said bonds and coupons were payable solely in United States money in the amounts thereof specified therein, and the Debtor has elected for said bonds and coupons to be payable in United States money in said amounts;

5. That said Guaranty Trust Company of New York, as the Trustee under the said First Terminal and Unifying Mortgage, has no right under the terms of the bonds or coupons or said mortgage or under amendatory Section 77 of the Bankruptcy Act, to make an election; on behalf of the holders of any or all of said bonds or coupons, to claim an indebtedness in guilders or guilders in terms of dollars, or in any other of the several moneys mentioned in said mortgage, such election being reserved by the terms of the bonds, coupons and the mortgage, to the holders of the bonds and coupons, (reference being hereby made to said provisions, as set forth in said mortgage, for a particular description of said provisions, with the same force and effect as if said provisions were herein set forth at length), and that to the extent that said proof of claim and supplement thereto purport to make election to receive payment in guilders for holders of any of said bonds or coupons who have not individually made such election, by presenting their bonds or coupons for payment in Amsterdam on or before the maturity date of said bonds or coupons or in such other manner as may be permitted by the provisions of the bonds, coupons or mortgage, said proof of claim and supplement thereto should be stricken from the record as improperly filed or, in lieu thereof, should be amended so as to set forth a claim on behalf of holders of bonds and coupons in the aggregate amount of their bonds in money of the United States of America at the rate of \$1,000 instead of \$1,687.722 in respect of each \$1,000 bond, and at the rate of \$25 instead of \$37.739 in respect of each \$25 coupon;

6. That as to any of said First Terminal and Unifying Bonds and coupons concerning which it may be finally determined that said claimant properly claimed an indebtedness based upon guilders, the amount of the claim as expressed in money of the United States should not be determined upon the basis of the value of the guilder on December 12, 1935, May 5, 1936, or September 24, 1936, or upon any

date prior to the judgment day, viz., the day on which the claims or such portion thereof as may be proper, are allowed by this court; and that said proof of claim and supplement thereto should be amended accordingly.

7. That, in addition to the objections, exceptions and amendments suggested above, and in any event, said proof of claim and supplement thereto should be reduced to the extent that valid individual proofs of claim are filed on behalf of said bonds or coupons by the holders thereof, personally or by proxy, and by the amount by which the value of guilders exceeds the value of any money other than guilders which any holder or holders of said bonds or coupons validly elect to receive in respect thereof, in the event it shall be finally determined that said claimant had and has the right to exercise the alleged guilder option aforesaid for bondholders not making individual election:

All rights of this protestant in respect to said claim are hereby expressly reserved, including the right to amend this protest and to make more definite any part thereof.

Wherefore, your protestant prays that the Court enter an order requiring that said proof of claim and supplement thereto be amended in accordance with the objections set forth herein, or in lieu thereof that the claim be partially denied in accordance herewith, and partially allowed in accordance herewith, depending upon the determination which may be made of the several issues presented by the protest, objections and exceptions contained herein.

SOUTHERN PACIFIC COMPANY,

By F. VAN NOTE,

Vice-President.

BEN C. DEY and

GEORGE L. BULAND,

Counsel for Southern Pacific Company,

165 Broadway,
New York, N. Y.

State of New York,

County of New York—ss.:

F. Van Note, being first duly sworn, deposes and says that he is the Vice President of Southern Pacific Company, the protestant above named, a Kentucky corporation, and that he has read the foregoing protest and knows the contents thereof, and that the statements contained therein are true,

according to the best of his knowledge, information and belief.

F. VAN NOTE.

Subscribed and sworn to before me this seventh day of May, 1937.

(Seal)

WARREN FAIRBROOK,
Notary Public, New York County
Clerk's No. 5, Register's No. 9-F-41
Commission Expires March 30,
1939.

Filed May 14, 1937. Jas J. O'Connor, Clerk.

Supplemental Protest of Berryman Henwood, Trustee, St. Louis Southwestern Railway Company, Debtor, to Proof of Claim and Supplemental Thereto Filed by Guaranty Trust Company of New York, as Trustee Under Mortgage Dated January 1, 1912, of St. Louis Southwestern Railway Company Securing First Terminal and Unifying Mortgage Bonds.

(Filed Nov. 6, 1937.)

Comes now Berryman Henwood, Trustee, St. Louis Southwestern Railway Company, Debtor, and supplements his protest against proof of claim and supplement thereto filed by Guaranty Trust Company of New York, as Trustee under a certain mortgage dated January 1, 1912, of St. Louis Southwestern Railway Company securing First Terminal and Unifying Mortgage Bonds, being proof of claim No. 251 and supplement thereto, filed herein on September 30, 1936, and March 15, 1937, respectively (and appearing at pages 1147 and 1939 of the Printed Record), and for additional protest, objections and exceptions thereto, Trustee avers

That said First Terminal and Unifying Mortgage Bonds were issued by the St. Louis Southwestern Railway Company, a Missouri corporation, in consideration of an amount of United States money less than the principal amount; (as expressed in United States money) of said bonds. That an increase of the indebtedness of the St. Louis Southwestern Railway Company on account of the principal of said bonds over and above the principal amount of said bonds, as expressed in United States money, as claimed by claimant herein or in any amount whatever, would constitute a fictitious increase of indebtedness of the St. Louis Southwestern Railway Company for which it did not receive an equivalent in money paid, labor done, or property actually received; that

any such increase in the indebtedness of said railway company on account of its said First Terminal and Unifying Mortgage Bonds over and above the principal amount of said bonds, as expressed in United States money, is prohibited and void by reason of Article XII, Section 8, of the Constitution of the State of Missouri, and of the Statutes of said State, particularly Section 4546, Rev. Stat. of Missouri, 1929, and is contrary to the public policy of Missouri.

This supplemental protest is not intended to alter or amend the Trustee's protest filed herein on May 8, 1937, the allegations herein being in addition to those contained in said protest, which remains in full force and effect. All rights of the Trustee and the Debtor in respect of said claim are hereby expressly reserved, including the right to amend his protest filed herein on May 8, 1937, or this supplemental protest and to make more definite any part thereof or hereof.

Wherefore, Trustee prays that the Court enter an order requiring that said proof of claim and supplement thereto be amended in accordance with the suggestions set forth in said protest filed herein on May 8, 1937, and herein, or in lieu thereof that the claim be partially denied in accordance therewith and herewith, depending upon the determination which may be made of the several issues presented by said protest, and the protest, objections and exceptions contained herein.

BERRYMAN HENWOOD,
Trustee, St. Louis Southwestern
Railway Company, Debtor,
By A. H. Kiskaddon,
General Counsel.

CARLETON S. HADLEY,
Assistant General Counsel.

Dated November 6, 1937.

Filed Nov. 6, 1937. Jas. J. O'Connor, Clerk.

Supplemental Protest of St. Louis Southwestern Railway Company to Proof of Claim and Supplement Thereto Filed by Guaranty Trust Company of New York, as Trustee Under Mortgage Dated January 1, 1912, of St. Louis Southwestern Railway Company Securing First Terminal and Unifying Mortgage Bonds.

(Filed Nov. 6, 1937.)

Comes now St. Louis Southwestern Railway Company, and supplements its protest against proof of claim and supple-

ment thereto filed by Guaranty Trust Company of New York, as Trustee under a certain mortgage dated January 1, 1912, of St. Louis Southwestern Railway Company securing First Terminal and Unifying Mortgage Bonds, being proof of claim No. 251 and supplement thereto, filed herein on September 30, 1936, and March 15, 1937, respectively (and appearing at pages 1147 and 1939 of the *Printed Record*), and adopts as its supplemental protest, objections and exceptions thereto the supplemental protest thereto heretofore filed by Berryman Henwood, Trustee, St. Louis Southwestern Railway Company, Debtor, reference being hereby made to said supplemental protest with the same force and effect as if its provisions were herein set forth at length.

Wherefore, protestant prays that the Court enter an order requiring that said proof of claim and supplement thereto be amended in accordance with the suggestions set forth in said Trustee's protest and supplement thereto, or in lieu thereof that the claim be partially denied in accordance therewith, and partially allowed in accordance therewith, depending upon the determination which may be made of the several issues presented by the said protest and supplemental thereto, hereby adopted by this protestant as its own.

ST. LOUIS SOUTHWESTERN RAIL-
WAY COMPANY,

By A. H. Kiskaddon,

CARLETON S. HADLEY,

Its Attorneys.

Dated November 6, 1937.

Filed Nov. 6, 1937. Jas. J. O'Connor, Clerk.

Supplemental Protest of Southern Pacific Company, Creditor and Stockholder of St. Louis Southwestern Railway Company, Debtor, to Proof of Claim and Supplement Thereto Filed by Guaranty Trust Company of New York, as Trustee Under Mortgage Dated January 1, 1912, of St. Louis Southwestern Railway Company Securing First Terminal and Unifying Mortgage Bonds.

(Filed Nov. 6, 1937.)

Comes now Southern Pacific Company and supplements its protest against proof of claim and supplement thereto filed by Guaranty Trust Company of New York, as Trustee under

a certain mortgage dated January 1, 1912, of St. Louis Southwestern Railway Company securing First Terminal and Unifying Mortgage Bonds, being proof of claim No. 251 and supplement thereto, filed herein on September 30, 1936, and March 15, 1937, respectively (and appearing at pages 1147 and 1939 of the Printed Record), and for additional protest, objections and exceptions thereto, Southern Pacific Company alleges:

That said First Terminal and Unifying Mortgage Bonds were issued by the St. Louis Southwestern Railway Company, a Missouri corporation, in consideration of an amount of United States money less than the principal amount, (as expressed in United States money) of said bonds. That an increase of the indebtedness of the St. Louis Southwestern Railway Company on account of the principal of said bonds over and above the principal amount of said bonds, as expressed in United States money, as claimed by claimant herein or any amount whatever, would constitute a fictitious increase of indebtedness of the St. Louis Southwestern Railway Company for which it did not receive an equivalent in money paid, labor done, or property actually received; that any such increase in the indebtedness of said railway company on account of its said First Terminal and Unifying Mortgage Bonds over and above the principal amount of said bonds, as expressed in United States money, is prohibited and void by reason of Article XII, Section 8, of the Constitution of the State of Missouri, and of the Statutes of said State, particularly Section 4546, Rev. Stat. of Missouri, 1929, and is contrary to the public policy of Missouri.

This supplemental protest is not intended to alter or vary the Southern Pacific Company's protest heretofore filed herein, the allegations herein being in addition to those contained in said protest, which remains in full force and effect. All rights of Southern Pacific Company in respect of said claim are hereby reserved, including the right to amend its protest and this supplemental protest and to make more definite any part thereof or hereof.

Wherefore, Southern Pacific Company prays that the Court enter an order requiring that said proof of claim and supplement thereto be amended in accordance with the suggestions set forth in the protest heretofore filed by Southern Pacific Company and in this supplemental protest, or in lieu thereof, that the claim be partially denied in accordance therewith and herewith, depending upon the determination

which may be made of the several issues presented by said protest and this supplemental protest.

SOUTHERN PACIFIC COMPANY,

By F. Van Note,
Vice President.

**BEN C. DEY,
GEORGE L. BULAND,**

Counsel for Southern Pacific Company,
165 Broadway, New York, N. Y.

State of New York,
County of New York—ss.

F. Van Note, being first duly sworn, deposes and says that he is the Vice President of Southern Pacific Company, the protestant above named, a Kentucky corporation, and that he has read the foregoing supplemental protest and knows the contents thereof, and that the statements contained therein are true, according to the best of his knowledge, information and belief.

F. VAN NOTE.

Subscribed and sworn to before me this 13th day of October, 1937.

WARREN FAIRBROOK,

(Seal)

Notary Public, New York County.
Clerk's No. 5, Register's No. 9-F-41.

Commission Expires March 30, 1939.

Filed Nov. 6, 1937. Jas. J. O'Connor, Clerk.

Record Entry of Hearing on Proof of Claim of Guaranty Trust Company. Before Hon. Charles B. Davis, Court No. 1.

November 26, 1937.

Hearing on Proof of Claim of Guaranty Trust Company of New York, as Trustee, under St. Louis Southwestern Ry. Co., First Terminal & Unifying Mortgage and protests thereto commenced, concluded and issues submitted to the Court on briefs to be hereafter presented.

Order on Claim of Guaranty Trust Company of New York
Trustee Under St. Louis Southwestern Railway Com-
pany First Terminal and Unifying Mortgage.

(Filed Mar. 21, 1938.)

[Order No. 276]

In the District Court of the United States, Eastern Division,
Eastern Judicial District of Missouri.

In the Matter of: .

St. Louis Southwestern Railway Company, Debtor.

In Proceedings for Reorganization of a Railroad.
No. 8497.

Guaranty Trust Company of New York, as trustee under the St. Louis Southwestern Railway Company First Terminal and Unifying Mortgage, dated January 1, 1912, having filed a proof of claim herein and a supplement thereto, claiming \$37,335,525.12 as the amount due on principal and interest on all the bonds outstanding under said Mortgage, as of December 12, 1935, with the proviso that the amount of said proof of claim shall be reduced to the extent that valid individual proofs of claim are filed on behalf of said bonds or interest coupons by the holders thereof, personally or by proxy, and by the amount by which the value of the guilders exceeds the value of any money other than guilders which any holder or holders of said bonds or coupons validly elect to receive in respect thereof, and protests and supplemental protests against said proof of claim and supplement thereto having been filed by Berryman Henwood, Trustee, St. Louis Southwestern Railway Company, Debtor; St. Louis Southwestern Railway Company, and Southern Pacific Company, a stockholder in and creditor of the said Debtor.

And the matter having been set down for hearing at St. Louis, Missouri, on November 26, 1937, and Guaranty Trust Company of New York, trustee; Frank C. Rand, trustee; E. Stanley Glines, W. Rodman Peabody and J. Hambleton Ober, as a Protective Committee for Holders of St. Louis Southwestern Railway Company First Terminal and Unifying Mortgage Bonds; Chemical Bank & Trust Company, trustee under St. Louis Southwestern Railway Company General and Refunding Mortgage; Berryman Henwood, Trustee, St. Louis Southwestern Railway Company, Debtor; St. Louis Southwestern Railway Company, and Southern Pacific Company, having appeared by counsel,

And said hearing having been had and completed, and the Court having considered the stipulation of facts, dated November 8, 1937, and filed herein on November 11, 1937, and the other evidence, and the Court having considered the statements, arguments and briefs of counsel, and the Court having made its findings of fact and conclusions of law and being fully advised in the premises,

It Is Ordered:

That the proof of claim of Guaranty Trust Company of New York, as Trustee under St. Louis Southwestern Railway Company First Terminal and Unifying Mortgage, being Claim No. 251 verified September 24, 1936, and filed herein, as amended by the supplement thereto verified March 12, 1937, and filed herein, be and it hereby is allowed as a claim in the amount of \$5,636,000 for principal and \$126,027.16 for interest on 5,636 bonds issued under said Mortgage, said allowance being \$1,000 for each of the said bonds as principal plus interest on said sum at the rate of 5% per annum from July 1, 1935, to December 12, 1935;

That the issues between the claimant Guaranty Trust Company of New York, Trustee, and the protestants having been severed by said stipulation dated November 8, 1937, with respect to the claims of all First Terminal and Unifying Mortgage bondholders (trustees or otherwise) who have filed separate proofs of claim in this proceeding, the determination herein and this order thereon are made without prejudice to the rights of said bondholders either upon their said separate proofs of claim or upon the said proof of claim of Guaranty Trust Company of New York, Trustee, as amended;

That in the event and to the extent that such separate proofs of claim of First Terminal and Unifying Mortgage bondholders (trustees or otherwise) filed herein shall not hereafter be allowed, whether on the ground of invalid filing or any other ground, claimant Guaranty Trust Company of New York, as Trustee, on their behalf shall be entitled to an additional allowance in respect of its said proof of claim, in the amount of \$1,022.3611 on account of principal and interest in respect of each \$1,000 principal amount of bonds represented by such separate proofs of claim, and shall be at liberty to apply to this Court at the foot of this order for such further allowance;

That the claim for any additional amount on account of the principal and interest accrued to December 12, 1935, on the said 5,636 bonds, with respect to which individual proofs of claim have not been filed, be and hereby is disallowed; and

That no determination is hereby made with respect to interest accruing subsequent to December 12, 1935, and amounts for compensation to the claimant Guaranty Trust Company of New York, as Trustee, and expenses and liabilities of said Trustee and any other sums which the Debtor St. Louis Southwestern Railway Company may be obligated to pay and which may be secured by the said Debtor's First Terminal and Unifying Mortgage.

CHARLES B. DAVIS,
District Judge.

Dated March 21, 1938.

Filed Mar. 21, 1938. Jas. J. O'Connor, Clerk.

Findings of Fact and Conclusions of Law On Issues Presented by Claim of Guaranty Trust Company of New York, Trustee Under St. Louis Southwestern Railway Company First Terminal and Unifying Mortgage, and Protests Thereeto.

(Filed Feb. 23, 1938.)

In the District Court of the United States, Eastern Division,
Eastern Judicial District of Missouri.

In the Matter of:

St. Louis Southwestern Railway Company, Debtor.

In Proceedings for Reorganization of a Railroad.

No. 8497.

Guaranty Trust Company of New York, as trustee under the St. Louis Southwestern Railway Company First Terminal and Unifying Mortgage, dated January 1, 1912, filed a proof of claim herein and a supplement thereto, claiming \$37,335,525.12 as the amount due on principal and interest on all the bonds outstanding under said Mortgage, as of December 12, 1935, with the proviso that the amount of said proof of claim shall be reduced to the extent that valid individual proofs of claim are filed on behalf of said bonds or interest coupons by the holders thereof, personally or by proxy, and by the amount by which the value of the guilders exceeds the value of any money other than guilders which any holder or holders of said bonds or coupons validly elect to receive in respect thereof. Protests and supplemental protests against said proof of claim and supplement thereto were filed by Berryman Henwood, Trustee, St. Louis Southwestern Railway Company, Debtor; St. Louis Southwestern Railway

Company, and Southern Pacific Company, a stockholder in and creditor of the said Debtor.

The matter was set down for hearing at St. Louis, Missouri, on November 26, 1937, and Guaranty Trust Company of New York, trustee; Frank C. Rand, trustee; E. Stanley Glines, W. Rodman Peabody and J. Hambleton Ober, as a Protective Committee for Holders of St. Louis Southwestern Railway Company First Terminal and Unifying Mortgage Bonds; Chemical Bank & Trust Company, trustee under St. Louis Southwestern Railway Company General and Refunding Mortgage; Berryman Henwood, Trustee; St. Louis Southwestern Railway Company; Southern Pacific Company; and Horace A. Davis, Benjamin S. Lichtenstein and Sylvan Gotshal, as a Protective Committee for Holders of Stephenville North & South Texas Railway Company First Mortgage Bonds and Central Arkansas and Eastern Railroad Company First Mortgage Bonds, appeared by counsel.

Said hearing having been had and completed, and the Court having considered the stipulation of facts, dated November 8, 1937, and filed herein on November 11, 1937, and the other evidence, and the Court having considered the statements, arguments and briefs of counsel, the Court makes its findings of fact and conclusions of law, as follows:

Findings of Fact.

The Court finds the facts to be as follows:

1. Guaranty Trust Company of New York is a corporation incorporated under the laws of the State of New York, and carrying on business at No. 140 Broadway, in the Borough of Manhattan, City, County and State of New York.

2. The Debtor St. Louis Southwestern Railway Company is a Missouri corporation, authorized to do business as a common carrier by railroad in the States of Missouri, Illinois, Arkansas, Tennessee and Louisiana. Said Debtor, on December 12, 1935, filed a petition for reorganization under amendatory Section 77 of the Bankruptcy Act. In and by an order of this Court dated December 12, 1935, the petition of said Debtor was approved as properly filed under said amendatory Section 77. Subsequent thereto, this Court appointed Berryman-Henwood as Trustee of the property of said Debtor, who thereafter duly qualified and is now acting as such Trustee.

3. Southern Pacific Company is a corporation incorporated under the laws of the State of Kentucky. It is a holder of stock of the Debtor and of a note of the Debtor in

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principal amount of \$17,882,250. As partial security for the note Southern Pacific Company holds \$23,903,000 principal amount of the Debtor's General and Refunding Mortgage Five Per Cent. Gold Bonds. Said Bonds contain the promise of the Debtor to pay the holders thereof the face amount thereof, together with interest thereon, in gold coin of the United States of America of or equal to the standard weight and fineness as it existed on the first day of July, 1906. Other bonds issued under other indentures of the Debtor contain provisions for payment in gold coin of the United States of the standard of weight and fineness prevailing at the time of issuance of such bonds, but no bonds of the Debtor other than the First Terminal and Unifying Mortgage Bonds (on which the proof of claim herein is based) contain provision for alternative payment in a fixed amount of formoney.

Said Debtor, shortly prior to April 24, 1912, pursuant to corporate action, authorized the creation of an issue of bonds to be known as its First Terminal and Unifying Mortgage Bonds (hereinafter sometimes called the "Bonds"), to the amount in aggregate principal amount as specified in, to be issued in manner and form as provided by, and to be secured by, an indenture of mortgage on the property of the Debtor therein described. In order to secure the payment of principal and interest of all the bonds issued and to be secured under said indenture according to their tenor and terms, and to secure the performance of all the covenants and conditions in said indenture contained, the Debtor, on or about April 24, 1912, in the United States of America, pursuant to corporate action, made and executed under its corporate seal, and delivered to Guaranty Trust Company of New York and Walker Hill, an individual citizen of the State of Missouri, as Trustee, an indenture of mortgage (herein sometimes called the "indenture"), dated January 1, 1912, a true copy of which is annexed to the proof of claim and marked as Exhibit A (Claimant's Exhibit 1). Guaranty Trust Company of New York and Walker Hill in the United States of America duly accepted the trust created by the mortgage and acted in the execution thereof to evidence such acceptance. Walker Hill having died, Frank C. Rand, an individual citizen of the State of Missouri, was appointed and became Successor Trustee to Walker Hill, on or about September 25, 1912, and still continues as such. Subsequent to the execution and delivery of the indenture and in accordance with the provisions thereof, the Debtor pledged and delivered to

the Claimant as Trustee, other securities not specifically described in the indenture.

The preamble to the indenture provides in part as follows:

" * * * said bonds, both as to principal and interest, to be payable at the office or agency of the Railway Company in the Borough of Manhattan, in the City and State of New York, in gold coin of the United States of America of or equal to the standard of weight and fineness as it existed January 1, 1912 (the coupon bonds also to be payable, both as to principal and interest, at such places in the following cities in foreign countries as the Board of Directors may from time to time designate, viz.: London, England, or Amsterdam, Holland, or Berlin, Germany, or Paris, France),
* * * "

Article First, Section 4, of the indenture provides:

"All or any of the coupon bonds issued hereunder from time to time shall be payable at the office or agency of the Railway Company in the Borough of Manhattan in the City and State of New York, or, at the option of the holders of said coupon bonds, in the cities and countries, respectively, and in the respective currencies stated in the form of coupon bond hereinbefore set forth, but the face amount of each of such coupon bonds shall be \$1,000 in United States gold coin of the standard of weight and fineness existing on January 1, 1912, or the equivalent thereof, calculated at the rates of exchange stated in the form of coupon bond hereinbefore set forth. The principal amount of First Terminal and Unifying Bonds which the Railway Company shall be entitled to issue under the provisions of this indenture shall be ascertained at the like rate or rates of exchange, and, for all purposes of this indenture and of said bonds, the indebtedness represented by said bonds in United States gold coin, as aforesaid, shall be calculated at the like rate or rates of exchange."

The form of coupon bond, as provided in the indenture, is as follows:

"St. Louis Southwestern Railway Company, a corporation of the State of Missouri (hereinafter called the Railway Company), for value received, hereby promises to pay to the bearer, or, if registered, to the registered holder, of this bond, on the first day of January, 1952, at its office or agency in the Borough of Manhattan, City and State of New York, One Thousand Dollars in gold coin of the United States of America, of or equal to the standard of weight and fineness as it existed January 1, 1912, or in London, England, £205 15s 2d, or in Amsterdam, Holland, 2490 guilders, or in Berlin,

Germany, marks 4200, D. R. W., or in Paris, France, 5180 francs, and to pay interest thereon, at the rate of five per cent. per annum, from the first day of January, 1912, in said respective currencies, semi-annually on the first day of January and the first day of July in each year, until payment of said principal sum, but only upon presentation and surrender, as they severally mature, of the interest coupons annexed hereto. Payment of the principal and interest of this bond will be made, at the holder's option, at the office or agency of the Railway Company in the Borough of Manhattan, in the City and State of New York, or at designated offices in the foreign cities and countries above mentioned. Both the principal and interest of this bond shall be paid without deduction for any tax or governmental charge which the Railway Company or the Trustees under the mortgage and deed of trust, hereinafter mentioned, may be required or permitted to pay or to retain therefrom under any present or future law of the United States of America or of any state, territory, county, municipality or other taxing authority therein."

The form of the interest coupon is as follows:

"No....."

\$25.	\$25.
105.05 Marks.	£5 2s 10½d.
129.50 Francs.	62.25 Guilders.

On the first day of _____, 19____, St. Louis Southwestern Railway Company will pay to the bearer, upon presentation and surrender of this coupon for cancellation, at its office or agency in the Borough of Manhattan, in the City of New York, Twenty-five Dollars (\$25) in United States gold coin, or in London, England, £5 2s. 10½d. Sterling, or in Amsterdam, Holland, 62.25 guilders, or in Berlin, Germany, 105.05 marks, or in Paris, France, 129.50 francs, being six months interest then due upon its First Terminal and Unifying Mortgage Bond, No."

The registered bonds did not contain provision for payment in foreign countries, but by their terms entitled the registered owner at his option to surrender the same for cancellation and in exchange for a like amount of the principal thereof in coupon bonds.

5. The following bonds were authenticated by Guaranty Trust Company of New York as Trustee under the indenture, and were by it delivered to or on the order of the Debtor, and are now held by various persons other than the Debtor, except as hereinbelow in this paragraph otherwise stated:

(1) 8,105 Bonds in the form of coupon bonds, in the form set out beginning on page 3 of the indenture (42 of which are held by the Debtor);

(2) Temporary Bonds of various denominations in the aggregate principal amount of \$3,425,000, payable to bearer, issued pursuant to Section 5 of Article First of the indenture, in the form attached to the proof of claim as Schedule B;

(3) One registered bond in the principal amount of \$10,108,000, in the form beginning on page 7 of the indenture which at the request of the Debtor has been issued in exchange for coupon bonds of a like principal amount.

6. Claimant's Exhibit 6 is a true copy of a resolution adopted by the Board of Directors of St. Louis Southwestern Railway Company on December 3, 1935, with respect to the omission of payments of interest due January 1, 1936, on the Bonds, and that a copy of said resolution was sent to Guaranty Trust Company of New York, trustee, shortly after December 3, 1935. Payments of the installments of interest payable on such Bonds on January 1, 1936, and thereafter were not and have not been made, and payments of the installments of interest payable on January 1, 1936, and thereafter, under the terms of the second mortgage of the Debtor dated February 12, 1891, were not and have not been made.

7. The Debtor has never maintained an office or agency in Amsterdam, Holland, for the payment of interest or principal on said bonds. In reply to an inquiry of the Committee on Stock List of the New York Stock Exchange regarding payment in foreign moneys in respect of the Bonds, the Debtor, in January, 1934, notified said Exchange that the Company had no foreign paying agent, and had not provided funds for the payment of coupons pertaining to the Bonds in any currency other than that of the United States; and on or about January 13, 1934, the office of the Secretary of the New York Stock Exchange published its Bulletin containing a statement to that effect. Guaranty Trust Company of New York was and is the agency for payment designated by the Debtor St. Louis Southwestern Railway Company, and said Debtor has never designated any office or agent in the United States other than the main office of Guaranty Trust Company of New York, in New York, pursuant to the provisions of the last paragraph of Section 1, Article 3, of the First Terminal and Unifying Mortgage, and Guaranty Trust Company of New York has and has had no branch office in Holland.

8. During the year 1912, the Debtor issued and sold in the State of New York, at a price of \$835 for each Bond in the principal dollar amount of \$1,000, plus accrued interest, its

First Terminal and Unifying Mortgage Bonds of a face amount (as expressed in American money) of \$8,155,000 to an original group of American purchasers, and payment therefor was received by the Debtor from said original group in money of the United States.

Prior to such issue and on March 25, 1912, the Debtor wrote to Guaranty Trust Company of New York a letter of which a copy is attached to the stipulation of facts as Exhibit B (Claimant's Exhibit 3). On March 28, 1912, Guaranty Trust Company wrote to the Debtor a letter of which a copy is attached to the stipulation of facts as Exhibit C (Claimant's Exhibit 4). Thereafter and for the purpose of the public offering of the bonds for sale the Debtor by its President wrote a letter to said group of purchasers which described said bonds and stated, among other things, that both principal and interest are payable at the office or agency of the Railway Company in the Borough of Manhattan in the City of New York, in gold coin of the United States of the present standard; coupon bonds are also payable, at the option of the holder, in London at 205 pds. 15s 2d Sterling, or in Amsterdam at 2,490 guilders, or in Berlin at 4,200 marks, D. R. W., or in Paris at 5,180 francs, for each \$1,000.00 of principal, and at proportionate equivalents for installments of interest, and that such bonds were issued for the purpose of expenditures in this country by the Railway Company in stated amounts in money of the United States equal to the principal dollar amount of the bonds being issued; that additional bonds may be issued under said indenture for the purposes of expenditures for refunding prior mortgage bonds which aggregated in amount \$40,950,000, and for future expenditures for improvements, additions and betterments to the property of the Railway Company in this country for designated purposes, in a principal amount, as expressed in United States money, equal to the expenditures in such money as aforesaid. Said letter stated the mortgage debt of the Railway Company, including the indebtedness represented by the First Terminal and Unifying Mortgage Bonds, as a specified amount in United States money, and stated the annual interest charges on the said First Terminal and Unifying Mortgage Bonds as being a specified amount in United States money.

Thereafter the said group of purchasers prepared and used in the public offering and sale of said bonds their prospectus describing the same and repeating the matter and things above quoted from said letter of the Debtor by its President, including among other things the following:

"Principal and interest of all bonds payable in gold in New York, and of coupon bonds also payable in London at £205 15s 2d sterling, or in Amsterdam at 2,490 guilders, or in Berlin at 4,200 marks, D. R. W., or in Paris at 5,180 francs, for each \$1,000 of principal and at proportionate equivalents for installments of interest."

The Railway Company's said First Terminal and Unifying Bonds were issued to evidence the Debtor's liability for the repayment of sums of United States money borrowed; they were not issued upon a sale or purchase of guilders or other foreign money; the provisions contained in said bonds for optional payment in guilders or other foreign moneys were an assurance, in addition to the "gold clause" contained in the bonds, to the holders thereof against a depreciation in the value of the United States dollar; the amount of guilders mentioned in the bonds was at the time of the issuance of said bonds the equivalent of \$1,000 United States gold coin of the standard of weight and fineness as it existed on January 1, 1912, and it was understood, and specified in the indenture under which said bonds were issued, that the amounts of guilders, pounds, francs or marks mentioned in said bonds were each the equivalent of United States gold coin in said amount and of such standard of weight and fineness.

Of said \$8,155,000 face amount of Bonds, \$42,000 face amount have been acquired by the Debtor and are now held by it, and \$50,000 face amount formerly held by a certain annuity trust were returned to the Debtor and are now held by Chemical Bank & Trust Company of New York as Successor Trustee under the Debtor's General and Refunding Mortgage.

Said bonds have been listed on the New York Stock Exchange since 1915 and have been actively traded in thereon since that time, and none of such Bonds were on December 12, 1935, owned or is now owned by the parties referred to in this paragraph 8 of these findings.

9. F. H. Millard is Comptroller for the Trustee and is and has been Comptroller for the Debtor for seventeen years, and said F. H. Millard knows of no requests having been made to the Debtor or to its officers, for the payment of any of said interest coupons in guilders; and no payments of interest on said interest coupons were made in guilders prior to July 1, 1933. On June 5, 1933, no options for payment of said Bonds or interest coupons in other than money of the United States had been exercised by any bondholder resident in the United States.

10. \$13,483,000 aggregate principal amount of the Bonds authenticated since 1912 by Guaranty Trust Company of New York as Trustee as aforesaid were delivered by it to the Debtor within the State of New York, and thereafter in 1932 were delivered in said State by the Debtor, along with \$50,000 additional of the Bonds, being a total of \$13,533,000, to The Chase National Bank of the City of New York as Trustee under the Debtor's General and Refunding Mortgage dated as of July 1, 1930, and are now held by Chemical Bank & Trust Company as Successor Trustee under said General and Refunding Mortgage.

11. On July 1, 1935, 1,730 individuals or corporations held \$7,344,000 principal dollar amount of said Bonds, and said 1,730 holders were residents of the United States; 37 individuals or corporations held \$715,000 principal dollar amount of said Bonds, and said 37 holders were residents of countries other than the United States; and of said 37 holders, one, holding two bonds, was a resident of Belgium; four, holding a total of 19 bonds, were residents of Canada; one, holding one bond, was a resident of Czecho-slovakia; two, holding a total of seven bonds, were residents of England; four, holding a total of six bonds, were residents of France; three, holding a total of 27 bonds, were residents of Holland; one, holding two bonds, was a resident of Italy; one, holding 610 bonds, was a resident of Liechtenstein; one, holding one bond, was a resident of Newfoundland; one, holding five bonds, was a resident of Nicaragua; and eighteen, holding a total of 35 bonds, were residents of Switzerland. A separate claim has been filed on the 610 bonds which on July 1, 1935, were held by the person or corporation which was a resident of Liechtenstein. Four bonds, whose holders cannot be identified, held one bond each on July 1, 1935.

12. It is not now known by whom all of the Bonds are now held, except by reason of other proofs of claim which have been filed on certain of said Bonds in these proceedings, but a substantial amount of said coupon bonds which remain outstanding are and were on December 12, 1935, owned and held by citizens and residents of the United States or by domestic corporations incorporated under the laws thereof, or of the States thereof.

There is no evidence that Guaranty Trust Company of New York has filed its claim on behalf of any foreign resident holder.

13. On May 5, 1936, pursuant to the petition of the Debtor's Trustee, Guaranty Trust Company of New York, as Trustee under the First Terminal and Unifying Mortgage,

was enjoined by the United States District Court, Eastern Division, Eastern Judicial District of Missouri, from declaring to be due and payable immediately the principal of all the First Terminal and Unifying Mortgage Bonds. The Circuit Court of Appeals for the Eighth Circuit reversed and remanded the order of injunction of the District Court by order entered on November 13, 1936. The Supreme Court of the United States denied on February 15, 1937, petition of the Debtor's Trustee for a writ of certiorari. By order of this Court dated February 24, 1937, the aforesaid injunction was dissolved, and pursuant to said order the Claimant, on February 25, 1937, served a notice upon the Trustee and the Debtor reading as follows:

"St. Louis Southwestern Railway Company and Berryman Henwood, Esq., as Trustee of St. Louis Southwestern Railway Company, Debtor.

Dear Sirs:

Default having occurred under the provisions of the First Terminal and Unifying Mortgage Bonds of St. Louis Southwestern Railway Company (hereinafter sometimes called the Debtor) and of the Indenture dated January 1, 1912, under which said Bonds were issued, in that, inter alia, default was made in the payment of the installment of interest payable on said Bonds on January 1, 1936, which default has continued for the space of three months and upwards and still continues, and in that default was made in the payment of the installment of interest which matured on January 1, 1936, under the terms of the Second Mortgage of the Debtor dated February 12, 1891, which default still continues:

You Will Please Take Notice that the undersigned Trustee under the above Indenture hereby declares the principal of all of the Bonds outstanding under said Indenture due and payable immediately on May 5, 1936, this notice being effective as of that date pursuant to the election of the undersigned, hereby evidenced, under the order entered February 24, 1937, by the United States District Court for the Eastern Division of the Eastern Judicial District of Missouri, In the Matter of St. Louis Southwestern Railway Company, Debtor, in proceedings for reorganization of a railroad No. 8497.

Dated, February 25, 1937.

GUARANTY TRUST COMPANY
OF NEW YORK,

As Trustee under the above Indenture
dated January 1, 1912.

By (S) Arthur E. Burke,
Corporate Trust Officer.

test:
(seal)

3) F. J. McGoldrick.
Assistant Secretary."

14. Claimant's Exhibit 7 is a true copy of a notice, dated June 4, 1936, addressed by Guaranty Trust Company of New York, trustee, to holders of the Bonds, and such notice was published in four daily newspapers of general circulation in the United States on June 4, 1936; in a newspaper in London, England, on June 6, 1936; in a newspaper in Zurich, Switzerland, on June 8, 1936; and in a newspaper in Amsterdam, Holland, on June 9, 1936, all being of general circulation in said cities, respectively.

15. The proof of claim of Guaranty Trust Company of New York, made and executed on September 24, 1936, was filed herein on September 26, 1936.

16. All of the acts were done which are set forth in the certificate of the Bailiff at Amsterdam, Holland, which is attached to the proof of claim, and a true translation of which is attached as Exhibit A to the stipulation of facts (Claimant's Exhibit 2); the acts of the Claimant purporting to exercise option for payment of the said Bonds in guilders or the equivalent of said guilders in dollars consist of the things done as disclosed by the said certificate, and of the making and filing of its proof of claim in this proceeding and the supplement thereto; Claimant's Exhibit 5 consists of true copies of the title page and three pages of a book which is received by the courts in Holland as evidence of Dutch statutory laws; the three sheets received therewith are a translation of said title page and of Sections 143 and 176 of the Dutch Commercial Code; and the acts done as aforesaid were done by Claimant as Trustee of said indenture.

17. At the time when the said bonds were issued or sold and at all pertinent times the guilder was and is the monetary unit of Holland, and the Nederlandsche Bank was and is entitled to act as its circulation bank.

During all of said time and up to the time of the hearing, the Nederlandsche Bank had the exclusive right to issue notes, and by Article I of the Law of July 18, 1904, S. 189, it is provided that so long as the Nederlandsche Bank is entitled to act as circulation bank, its notes have the quality of legal tender and lawful money; and its notes now are legal tender, except as to payments to be made by the Nederlandsche Bank itself.

The following are articles of the Law of the Kingdom of The Netherlands, of May 28, 1901, S. 132, as amended by the Laws of December 31, 1906, S. 376, July 1, 1909, S. 252, October 31, 1912, S. 324, and November 27, 1919, S. 786.

Article 1.

The currency-unit of The Netherlands' monetary system is the guilder.

The guilder is divided into one hundred cents.

Article 2.

The States' coins are:

A. with the quality of legal tender:

I. up to any amount:

a. in gold:

the ten guilders piece;
the five-guilders piece;

b. in silver:

the ryksdaalder or two and a half guilders;
the guilder;
half a guilder;

II. to a limited amount the following changes:

a. in silver:

the twenty-five cents piece;
the ten-cents piece;

b. in nickel:

the stuiver or the five-cents piece;

c. in bronze:

the two and a half-cents piece;
the cent;
half a cent.

B. without the quality of legal tender:
the gold dukaat.

Article 6.

The coins named in Article 2 have a degree of fineness, weight and diameter, with a margin allowable as regards the degree of fineness and weight above as well as below, which have been fixed as follows:

Species of coin		Degree of fineness	
		legal thousandths	margin thousandths
Gold	(10 guilders	900	1.5
	(5 guilders	900	1.5
	(dukaat	983	1.0
Silver	(2½ guilders)		
	(guilder)	720	3.0
	(½ guilder)		
	(25 cents)	640	4.0
Nickel	(10 cents)		
	(5 cents)	(250 nickel 750 copper)	(10 nickel) (10 copper)
Bronze	(2½ cents	950 copper	10 copper
	(cent	40 tin	5 tin
	(½ cent	10 zinc	5 zinc

Species of coin		Weight		Diameter milli- metres
		legal grammes	margin thousandths	
Gold	(10 guilders	6.720	2	22.5
	(5 guilders	3.360	2.5	18.0
	(dukaat	3.494	2	21.0
Silver	(2½ guilders)	25.000	4	38.0
	(guilder)	10.000	5	28.0
	(½ guilder)	5.000	6	22.0
	(25 cents)	3.575	10	19.0
	(10 cents)	1.400	15	15.0
Nickel	5 cents	4.500	Square with sides of 18 millimetres except round- ing off at cor- ners.	
Bronze	(2½ cents	4.00	(one in	
	(cent	2.500	every	
	(½ cent	1.250	100 coins	

The said articles were in full force and effect at the time when the said Bonds were issued or sold and at all pertinent times and are at present in full force and effect.

At all times pertinent here, the bearer of a note issued by the Nederlandsche Bank has not been entitled to claim either gold, or gold coins; all he was and is entitled to claim was and is that his notes should be exchanged by the bank for

other legal tender, and the Nederlandsche Bank was free to meet the payment of its notes in gold or silver according to its own choice. For a long period including some time prior to June 5, 1933, it has been the policy of the Nederlandsche Bank not to make payment of its notes in gold coins, and during such period it has not done so. Prior to September 27, 1936, the Nederlandsche Bank delivered gold for export whenever the exchanges on countries maintaining a market for gold reached gold export point, such deliveries for export being made to Dutch bankers and banks who undertook to furnish proof within a reasonable time that the gold had actually been delivered at the central bank of the country to which it was sent. Prior to said date exports of gold were so allowed to the United States of America. On and after September 27, 1936, by royal decree dated September 26, 1936, later confirmed by statute, Holland suspended the export of gold.

During the years 1912 and 1913, the value of the Dutch guilder in terms of the United States dollar was \$.4020. During the period from January 31, 1934, to September 27, 1936, the value of the Dutch guilder in terms of the United States dollar was \$.680567.

18. The parties have agreed that the exchange value of the guilder in terms of the dollar of the United States of America was, and is to be taken as, \$.6778 on each of the following dates on which the following happened, to wit: the date on which Petition No. 1 was filed in these proceedings, and on which Order No. 1 was entered, inter alia, approving said petition as properly filed, viz., December 12, 1935; the effective date of the declaration by Guaranty Trust Company of New York, as Trustee, as of which all of the Bonds were, pursuant to the indenture, declared immediately due and payable, viz., May 5, 1936; the date on which demand and protest of nonpayment were made in Amsterdam, Holland, by or in behalf of Claimant, for the payment in guilders of the principal and interest of the Bonds for which proof of claim was filed as aforesaid, and on which Claimant had made and executed its proof of claim aforesaid, viz., September 24, 1936, and the exchange value of the guilder on November 8, 1937, was \$.5560.

Conclusions of Law.

The Court declares the law to be that:

1. The Joint Resolution of Congress of June 5, 1933 (hereinafter called the "Joint Resolution"), reaches and ap-

plies to every obligation payable in money of the United States, incurred before or after June 5, 1933, whether or not there is contained therein or made with respect thereto any provision which purports to give the obligee a right to require payment in gold or a particular kind of coin or currency of the United States, or in an amount in money of the United States measured thereby, and every obligation payable in money of the United States must be discharged upon payment, dollar for dollar, in any coin or currency of the United States which at the time of payment is legal tender for public and private debts.

2. The word "obligation," as used in the Joint Resolution, refers to a bond or coupon of the character therein defined, as a whole, rather than to particular "provisions" contained therein. The Supreme Court of the United States so construed the word "obligation" in *Norman v. Baltimore & Ohio Railroad*, 294 U. S. 240, 79 L. Ed. 885, and *Perry v. United States*, 294 U. S. 330, 79 L. Ed. 912.

3. The word "payable," as used in the Joint Resolution, and as applied to the Debtor's First Terminal and Unifying Mortgage Bonds, means "capable of being paid." The First Terminal and Unifying Mortgage Bonds of St. Louis Southwestern Railway Company issued under and pursuant to the Railway Company's First Terminal and Unifying Mortgage are required to be paid in United States dollars, reserving an option in the holders of the Bonds to elect to receive payment in guilders, francs, marks or pounds, and, even if the dollar payment be considered as an option equal only in rank to the option to receive payment in the foreign currencies, the Bonds are capable of being paid and the Debtor may be compelled to pay in money of the United States, and therefore they are "payable in money of the United States" within the meaning of the Joint Resolution.

4. The Joint Resolution deals with obligations payable in a specified amount of money of the United States which also contain provisions attempting to confer additional rights upon obligees, and the application of the Joint Resolution is not limited to obligations which can be paid only in money of the United States. Any contract which gives the obligee an unqualified right to receive money of the United States, even though such right requires the exercise of an option is within the scope of the Joint Resolution.

5. The Bonds on which said claim was filed were obligations payable in money of the United States on June 5, 1933, and therefore the Joint Resolution reaches and applies to said Bonds.

6. The option contained in the Bonds became inoperative on June 5, 1933, which was the effective date of the Joint Resolution, and the purported election (whether or not the Claimant, as Trustee, had the power to make an election) on a date subsequent to June 5, 1933, was and is wholly ineffective and without any force or effect. The said Bonds were on June 5, 1933, payable in money of the United States and the said Joint Resolution on that date directed that all obligations then so payable should be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts. This declaration of the public policy of the United States may not be avoided or defeated by a subsequent purported election to receive payment in a currency other than money of the United States.

7. Bonds of the character defined in the Joint Resolution must be discharged upon payment, dollar for dollar, in any coin or currency of the United States which at the time of payment is legal tender for public or private debts, and, the Debtor being in bankruptcy under amendatory Section 77 of the Bankruptcy Act and therefore being incapable of discharging said Bonds by payment of any kind, a claim on said Bonds must be allowed, dollar for dollar, in any coin or currency of the United States which at the time of allowance is legal tender for public and private debts.

8. Any presumption which may exist against extra-territorial construction of a statute does not preclude a country from enforcing its rule of public policy where resort is had to its courts to enforce the obligations of its citizens. No such presumption precludes the United States from enforcing the rule of public policy announced in the Joint Resolution and it is the duty of this Court to enforce said rule of public policy in these proceedings.

9. Under the authority of the decision of the Supreme Court of the United States in *Holyoke Water Power Company v. American Writing Paper Company*, 300 U. S. 324, 81 L. Ed. 383, the alternative forms of payment in the Bonds here involved shed light upon each other; the obligations require the payment of money and not the delivery of a commodity; what was intended by the issuance of the Bonds was to assure the payment of a money debt in United States dollars of a value as constant as that of gold or other currencies; the words used in the Bonds must be read in the setting of the whole transaction, and so read they show that the end in view was a repayment of United States money loaned and not a sale of guilders or any other currency or commodity;

and for these reasons and for the reasons set forth in the foregoing findings and in these conclusions, the Bonds are within the letter of the Joint Resolution and equally within its spirit.

10. The Dutch guilder is capable of being measured in gold, and the number of guilders mentioned in each bond was specified as the equivalent of United States gold coin of the standard of weight and fineness existing on January 1, 1912. Under the authority of the decision of the United States Supreme Court in the Holyoke case, *supra*, a contract for the payment of gold as the equivalent of money, and a fortiori, a contract for the payment of money measurable in gold, is within the letter of the Joint Resolution and equally within its spirit.

11. The decision of the United States Supreme Court in the Holyoke case, *supra*, placed an interpretation upon the Joint Resolution inconsistent with the interpretation placed thereon by the United States Circuit Court of Appeals for the Second Circuit in *Anglo-Continentale Treuhand. A. G. v. St. Louis Southwestern Railway Company*, 81 Fed. (2d) 11, certiorari denied 80 L. Ed. 1381, and in any event this Court is not bound by the decision of said Circuit Court of Appeals in said case.

12. This Court is bound to follow the decision of the United States Supreme Court in the Holyoke case, *supra*, and said decision supports the conclusions here reached.

13. Guaranty Trust Company of New York, as Trustee, is entitled to an order allowing the claim on said Bonds, in the principal amount of \$21,638,000 in the currency of the United States which is presently legal tender for public and private debts, plus unpaid interest thereon to December 12, 1935, at the rate provided in said Bonds, said amount to be reduced to the extent that individual proofs of claim have been filed on behalf of said Bonds or interest coupons by the holders thereof, personally or by proxy.

The Court having determined to allow this claim in the amount and on the grounds stated above; it is unnecessary for this Court to determine the other issues in respect to the claim for allowance in an additional amount presented by the proof of claim and the protests against the same.

Order to be settled on notice.

CHARLES B. DAVIS,
District Judge.

Dated February 23, 1938.

Filed Feb. 23, 1938. Jas. J. O'Connor, Clerk.

(Petition for Appeal Filed in U. S. District Court.)

(Filed April 2, 1938.)

In the District Court of the United States, Eastern Division,
Eastern Judicial District of Missouri,

In the Matter of:

St. Louis Southwestern Railway Company, Debtor.

In Proceedings for Reorganization of a Railroad.

No. 8497.

Guaranty Trust Company of New York, as Trustee under St. Louis Southwestern Railway Company First Terminal and Unifying Mortgage dated January 1, 1912, Appellant,

vs.

Berryman Henwood, Trustee of St. Louis Southwestern Railway Company, Debtor, St. Louis Southwestern Railway Company, and Southern Pacific Company, Appellees.

To the Honorable Charles B. Davis, Judge of the United States District Court:

Guaranty Trust Company of New York, as Trustee under St. Louis Southwestern Railway Company First Terminal and Unifying Mortgage dated January 1, 1912, respectfully shows that on March 21, 1938, this Court entered its order in the above-entitled cause allowing in part and disallowing in part the proof of claim and supplement thereto of your petitioner; that protests against said proof of claim were filed by the above-entitled appellees; that your petitioner feels itself aggrieved by the said order and action of said Court and prays that it may be permitted to take an appeal from said order to the United States Circuit Court of Appeals for the Eighth Circuit, for the reasons specified in the Assignment of Errors which is filed herewith.

Your petitioner therefore prays that an order be made fixing the amount of security which your petitioner shall give and furnish upon such an appeal, and that upon giving such security an appeal be allowed to the United States Circuit Court of Appeals for the Eighth Circuit, and that citation be issued to all the above-entitled appellees, and that a transcript of the record, proceedings and papers upon which said

order was made, duly authenticated, be sent to the United States Circuit Court of Appeals for the Eighth Circuit.

Dated this 2nd day of April, 1938.

DAVIS, POLK, WARDWELL, GARDINER & REED,

THOMPSON, MITCHELL, THOMPSON & YOUNG,

Attorneys for Petitioners, Guaranty Trust Company of New York, as Trustee under St. Louis Southwestern Railway Company First Terminal and Unifying Mortgage dated January 1, 1912.

(Assignment of Errors on Appeal allowed by U. S. District Court.)

(Filed April 2, 1938.)

Comes now Guaranty Trust Company of New York as Trustee under St. Louis Southwestern Railway Company First Terminal and Unifying Mortgage, dated January 1, 1912, and files the following assignment of errors upon which it will rely in the prosecution of the appeal herewith petitioned for in the above entitled cause from the order of this Court entered on the 21st day of March, 1938.

1. The Court erred in entering its order dated March 21, 1938, in allowing only \$1,000.00, plus interest, for each of the Debtor's First Terminal and Unifying Mortgage Bonds (hereinafter termed the "Bonds") allowed under said claim.

2. The Court erred in entering its order dated March 21, 1938, in failing to allow the sum of \$1,687.72, principal amount, plus \$37.739, being interest on said principal amount, at the rate of 5% per annum from July 1, 1935, to December 2, 1935, being the total amount of \$1,725.46 on each of the Bonds allowed under said claim.

3. The Court erred in entering its order dated March 21, 1938, in restricting the allowance on the Bonds allowed under said claim to the stated dollar amount of said Bonds, plus interest, instead of allowing an amount equal to the guilder exchange value of 67.78 cents on 2490 guilders principal amount of each Bond, plus interest on said amount at the rate of 5% per annum from July 1, 1935, to December 2, 1935.

4. The Court erred in entering its order dated March 21, 1938, in restricting the allowance on the Bonds allowed under said claim to the stated dollar amount of said Bonds, plus interest, instead of allowing an amount equal to the proper guilder exchange value on 2490 guilders principal amount of each Bond, plus interest on said amount at the rate of 5% per annum from July 1, 1935, to December 12, 1935.

5. The Court erred in entering its order dated March 21, 1938, in allowing said claim only on the basis of the dollar face value of said bonds and making no allowance on account of the option conferred by said Bonds to receive payment in guilders.

6. The Court erred in that part of its Finding of Fact number 8 reading as follows:

"The Railway Company's said First Terminal and Unifying Bonds were issued to evidence the Debtor's liability for the repayment of sums of United States money borrowed."

7. The Court erred in failing to find that the foreign currency clauses of the Debtor's Bonds constituted an optional medium of payment offered by the Debtor at the time of the original issue of said Bonds for the purpose and with the effect of inducing purchasers thereof to purchase the same.

8. The Court erred in failing to find that the foreign currency clauses in the Debtor's Bonds were part of the consideration moving from the Debtor for the price paid therefor by purchasers thereof.

9. The Court erred in failing to find that at the time of issuance of the Debtor's Bonds, the Debtor understood, contemplated and agreed that the duty and expense of obtaining foreign exchange, including guilder exchange, would be assumed and discharged by the Debtor upon any valid election by or on behalf of any holders of said Bonds to receive any foreign currency permitted by said option.

10. The Court erred in failing to find that upon and in connection with the execution and delivery of the Debtor's First Terminal and Unifying Mortgage and upon and in connection with the issuance and purchase of the Debtor's Bonds thereunder, the Debtor intended and agreed with or for the benefit of purchasers and holders of said Bonds that the foreign currency options stated in said Bonds, whether in guilders, marks, pounds or French francs, were and were

to be equal and interchangeable alternatives of the same rank with the promise therein to pay dollars.

11. The Court erred in failing to find that upon and in connection with the execution and delivery of the Debtor's First Terminal and Unifying Mortgage and upon and in connection with the issuance and purchase of the Debtor's Bonds thereunder, the Debtor intended and agreed with or for the benefit of purchasers and holders of said Bonds that the Debtor would, upon any valid election of the money of payment, pay the designated amounts in the respective currencies, whether in dollars, guilders, marks, pounds or French francs, as alternative promises of co-ordinate and equal rank in all respects.

12. The Court erred in failing to find that the Debtor's promise in its Bonds to pay United States dollars was and was intended to be a promise performable only on the valid exercise of the option contained in said Bonds and said Mortgage.

13. The Court erred in failing to find that at the time of issuance of the Bonds the Debtor intended and agreed with or for the benefit of purchasers or holders of said Bonds that at the maturity or upon any acceleration thereof the option of the medium of payment as among dollars, guilders, marks, pounds or francs should be exercised by, or on behalf of, the holders of said Bonds.

14. The Court erred in that part of its Finding of Fact number 8 reading as follows:

"* * * the amount of guilders mentioned in the bonds was at the time of the issuance of said bonds the equivalent of \$1,000 United States gold coin of the standard of weight and fineness as it existed on January 1, 1912, and it was understood, and specified in the indenture under which said bonds were issued, that the amounts of guilders, pounds, francs or marks mentioned in said bonds were each the equivalent of United States gold coin in said amount and of such standard of weight and fineness."

15. The Court erred in failing to find as part of its Finding of Fact number 8 in lieu of the part thereof above quoted in the Assignment of Error numbered 14:

"* * * the amount of guilders mentioned in the bonds was at the time of the issuance of said bonds the equivalent of \$1,000 United States gold coin of the standard of weight and fineness as it existed on January 1, 1912, and it was understood and specified in the Indenture under which said

bonds were issued, that the amounts of guilders, pounds, francs or marks mentioned in said bonds were each the equivalent of United States gold coin in said amount and of such standard of weight and fineness at the time of issuance in 1912, but not necessarily at any other time or at any time after the time of issuance in 1912."

16. The Court erred in failing to find that at the time of issuance of the Debtor's Bonds the Debtor understood and realized that after issuance thereof the foreign currencies mentioned in said Bonds might fluctuate on the exchange market by comparison with United States dollars.

17. The Court erred in failing to find that the Claimant's election to receive, and demand for, payment in guilders of the amount embraced within its proof of claim, was duly made on September 24, 1936.

18. The Court erred in its Conclusion of Law No. 1 in holding that the Joint Resolution of Congress of June 5, 1933 (hereinafter called the "Joint Resolution"), reaches and applies to every obligation payable in money of the United States, incurred before or after June 5, 1933, whether or not there is contained therein or made with respect thereto any provision which purports to give the obligee a right to require payment in gold or a particular kind of coin or currency of the United States, or in an amount in money of the United States measured thereby.

19. The Court erred in its Conclusion of Law No. 1 in holding that every obligation payable in money of the United States must be discharged upon payment, dollar for dollar, in any coin or currency of the United States which at the time of payment is legal tender for public and private debts.

20. The Court erred in failing to hold that the Joint Resolution of Congress of June 5, 1933, does not reach and apply to obligations which may be paid in money of the United States but may also be paid in some foreign currency if such foreign currency is validly elected as the medium of payment.

21. The Court erred in its Conclusion of Law No. 2 in holding that the word "obligation" in the Joint Resolution refers to a bond or coupon of a character therein defined, as a whole, rather than to particular "provisions" contained therein.

22. The Court erred in its Conclusion of Law No. 2 in holding that the Supreme Court of the United States in *Norman v. Baltimore & Ohio R. R.*, 294 U. S. 240, 79 L. Ed.

885, and *Perry v. United States*, 294 U. S. 330, 79 L. Ed. 912, construed the word "obligation" as referring to a bond or coupon of the character defined in the Joint Resolution, as a whole, rather than particular "provisions" contained therein.

23. The Court erred in its Conclusion of Law No. 3 in holding that the word "payable" as used in the Joint Resolution, and as applied to the Debtor's Bonds means "capable of being paid".

24. The Court erred in failing to hold that the word "payable" as used in the Joint Resolution, and as applied to the Debtor's Bonds, refers to obligatory payment rather than permissive payment.

25. The Court erred in its Conclusion of Law No. 3 in holding that the Bonds of St. Louis Southwestern Railway Company issued under and pursuant to the Railway Company's First Terminal and Unifying Mortgage are required to be paid in United States dollars, reserving an option to the holders of the Bonds to elect to receive payment in guilders, francs, marks or pounds.

26. The Court erred in its Conclusion of Law No. 3 in holding that even if the aforesaid promises to pay guilders, francs, marks, or pounds, be considered as alternative to, and of equal rank with, the aforesaid promise to pay dollars, the Bonds are capable of being paid and the Debtor may be compelled to pay in money of the United States, and therefore they are "payable in money of the United States" within the meaning of the Joint Resolution.

27. The Court erred in failing to hold that the Bonds are not primarily dollar obligations, and that the promises contained therein to pay guilders, francs, marks or pounds, are alternative to, and of an exactly equal rank with the promise contained therein to pay dollars.

28. The Court erred in its Conclusion of Law No. 4 in holding that the Joint Resolution deals with obligations payable in a specified amount of money of the United States which also contain provisions attempting to confer additional rights upon obligees and that the application of the Joint Resolution is not limited to obligations which can be paid only in money of the United States.

29. The Court erred in its Conclusion of Law No. 4 in holding that any contract which gives the obligee an unqualified right to receive money of the United States, even though such right requires the exercise of an option, is within the scope of the Joint Resolution.

30. The Court erred in failing to hold that any contract which gives the obligee the right to receive the money of the United States contingent on the exercise of an option which also affords the obligee the alternative right to receive money of a foreign nation, is not within the scope of the Joint Resolution.

31. The Court erred in failing to hold that the right to elect the currency which should be the medium of payment for the Bonds belonged to the Bondholders or to the Claimant acting on their behalf, and at no time passed to the Debtor.

32. The Court erred in its Conclusion of Law No. 5 in holding that the Bonds on which the said claim was filed were obligations payable in money of the United States on June 5, 1933, and therefore the Joint Resolution reaches and applies to said Bonds.

33. The Court erred in its Conclusion of Law No. 6 in holding that the option contained in the Bonds became inoperative on June 5, 1933, which was the effective date of the Joint Resolution, and that the purported election (whether or not the Claimant, as Trustee, had the power to make an election) on a date subsequent to June 5, 1933, was and is wholly ineffective and without any force or effect.

34. The Court erred in its Conclusion of Law No. 6 in holding that said Bonds were on June 5, 1933, payable in money of the United States and the said Joint Resolution on that date directed that all obligations then so payable should be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts.

35. The Court erred in failing to find that the election by Guaranty Trust Company as Trustee to receive payment in guilders was not contrary to the public policy of the United States as expressed in the Joint Resolution.

36. The Court erred in its Conclusion of Law No. 7 in holding that bonds of the character defined in the Joint Resolution must be discharged upon payment, dollar for dollar, in any coin or currency of the United States which at the time of payment is legal tender for public or private debts, and the Debtor being in bankruptcy under amendatory Section 77 of the Bankruptcy Act and therefore being incapable of discharging said Bonds by payment of any kind, a claim on said Bonds must be allowed, dollar for dollar, in any coin or currency of the United States which at the time of allowance is legal tender for public and private debts.

37. The Court erred in failing to hold that the Joint Resolution of Congress of June 5, 1933, declares to be against public policy only provisions in an obligation which purport to give the obligee a right to require payment in gold or a particular kind of coin or currency of the United States or an amount in money of the United States measured thereby.

38. The Court erred in failing to hold that a provision which purports to give the obligee a right to require payment in units of a specified foreign currency not money of the United States is valid and enforceable, even though contained in an obligation also containing provisions which purport to give the obligee an alternative right to require payment in money of the United States measured by gold.

39. The Court erred in holding in its Conclusion of Law No. 8 that the rule of public policy announced in the Joint Resolution is applicable to the Bonds herein.

40. The Court erred in its Conclusion of Law No. 9 in holding that under the authority of the Supreme Court of the United States in *Holyoke Water Power Company vs. American Writing Paper Company*, 300 U. S. 324, 81 L. Ed. 383, the alternative forms of payment in the Bonds here involved require the payment of money and not the delivery of a commodity.

41. The Court erred in its Conclusion of Law No. 9 in holding that what was intended by the issuance of the Bonds was to assure the payment of a money debt in United States dollars of a value as constant as that of gold or other currencies.

42. The Court erred in its Conclusion of Law No. 9 in holding that the words used in the Bonds show that the end in view was a repayment of United States money loaned and not a sale of guilders or any other currency or commodity.

43. The Court erred in its Conclusion of Law No. 9 in holding that the Bonds are within the letter of the Joint Resolution and equally within its spirit.

44. The Court erred in failing to hold that the guilder option contained in the Bonds, when validly exercised, became a straight contract to pay guilders.

45. The Court erred in failing to hold that the promise to pay guilders in Amsterdam, contained in the Bonds, is, in the eyes of the Court, a promise to deliver an ordinary commodity.

46. The Court erred in failing to hold that the Debtor's contract to pay guilders in Amsterdam, as set forth in its Bonds, was and is either a contract to deliver a commodity, or a contract to pay foreign money in a foreign country, and that such contract in either case is outside the scope of the Joint Resolution.

47. The Court erred in its Conclusion of Law No. 10 in holding that the number of guilders mentioned in each bond was specified as the equivalent of United States gold coin of the standard of weight and fineness existing on January 1, 1912, and that under the authority of the decision of the United States Supreme Court in *Holyoke Water Power Company vs. American Writing Paper Company*, 300 U. S. 324, a contract for the payment of gold as the equivalent of money, and a fortiori, a contract for the payment of money measureable in gold, is within the letter of the Joint Resolution and equally within its spirit.

48. The Court erred in its Conclusion of Law No. 11 in holding that the decision of the United States Supreme Court in *Holyoke Water Company vs. American Writing Paper Company*, 300 U. S. 324, 81 L. Ed. 383, places an interpretation upon the Joint Resolution inconsistent with the interpretation placed thereon by the United States Circuit Court of Appeals for the Second Circuit in *Anglo-Continentale Treuhand, A. G. vs. St. Louis Southwestern Railway Company*, 81 F. (2d) 11, cert. denied 80 L. Ed. 1381.

49. The Court erred in failing to follow the decision of the United States Circuit Court of Appeals for the Second Circuit in *Anglo-Continentale Treuhand, A. G. vs. St. Louis Southwestern Railway Company*, 81 F. (2d) 11, cert. denied 80 L. Ed. 1381.

50. The Court erred in holding in its Conclusion of Law No. 12 that it was bound in this case to follow the decision of the United States Supreme Court in *Holyoke Water Power Company vs. American Writing Paper Company*, 300 U. S. 324.

51. The Court erred in its Conclusion of Law No. 12 in holding that the decision of the United States Supreme Court in *Holyoke Water Power Company vs. American Writing Paper Company*, 300 U. S. 324, 81 L. Ed. 383, supports the conclusions reached by the Court herein.

52. The Court erred in failing to hold that the Joint Resolution does not apply to contracts to pay guilders in Holland.

Wherefore, your petitioner prays that the said order may be reversed and the proof of claim of your petitioner be allowed in full, and for such other and further relief as to the Court may seem just and proper.

Dated April 2, 1938.

**GUARANTY TRUST COMPANY
OF NEW YORK,**

As Trustee under St. Louis Southwestern Railway Company First Terminal and Unifying Mortgage, dated January 1, 1912, Petitioner,

**DAVIS, POLK, WARDWELL,
GARDINER & REED,**

By Thompson, Mitchell, Thompson & Young, Its Attorneys.

Order Allowing Appeal of Guaranty Trust Company of New York, as Trustee Under St. Louis Southwestern Railway Company First Terminal and Unifying Mortgage, Dated January 1, 1912.

Filed April 2, 1938.

In the District Court of the United States, Eastern Division,
Eastern Judicial District of Missouri.

In the Matter of

St. Louis Southwestern Railway Company, Debtor.

In Proceedings for Reorganization of a Railroad.

No. 8497.

Guaranty Trust Company of New York, as Trustee under St. Louis Southwestern Railway Company First Terminal and Unifying Mortgage dated January 1, 1912, Appellant,

vs.

Berryman Henwood, Trustee of St. Louis Southwestern Railway Company, Debtor, St. Louis Southwestern Railway Company, and Southern Pacific Company, Appellees.

The petition of Guaranty Trust Company of New York, as Trustee under St. Louis Southwestern Railway Company First Terminal and Unifying Mortgage dated January 1, 1912, for an appeal from the order of this Court dated March 21, 1938, allowing in part and disallowing in part the proof of

claim and the supplement thereto of said petitioner is hereby granted and an appeal to the United States Circuit Court of Appeals for the Eighth Circuit is hereby allowed.

It is Further Ordered, that the bond on appeal be fixed in the sum of Five Hundred Dollars (\$500.00) and that the Clerk of this Court shall make and transmit to said Circuit Court of Appeals under his seal and the seal of this Court, a true copy of the material parts of the record herein which shall be designated by praecipe or stipulation of the parties or of their counsel; and that citation be issued to the above entitled appellees.

Dated this 2 day of April, 1938.

CHARLES B. DAVIS,
District Judge.

(Bond on Appeal allowed by U. S. District Court.)

Filed April 2, 1938.

Know All Men By These Presents, That we, Guaranty Trust Company of New York, a corporation, as principal and United States Fidelity And Guaranty Company, a corporation, as surety, are held and firmly bound unto Berryman Henwood, Trustee of St. Louis Southwestern Railway Company, Debtor, St. Louis Southwestern Railway Company and Southern Pacific Company in the sum of Five Hundred Dollars (\$500.00) to be paid to the said Obligees to which payment well and truly to be made we bind ourselves and our successors, jointly and severally, by these presents.

The condition of this obligation is that:

Whereas, Guaranty Trust Company of New York, as Trustee under St. Louis Southwestern Railway Company First Terminal and Unifying Mortgage dated January 1, 1912, has filed its petition praying for the allowance of an appeal to the United States Circuit Court of Appeals for the Eighth Circuit from the order entered in the above-entitled cause on March 21, 1938, allowing in part and disallowing in part the proof of claim and the supplement thereto of said Guaranty Trust Company of New York, as such trustee; and

Whereas, said appeal has been allowed by the Honorable Charles B. Davis, Judge of the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri;

Now, Therefore, if said Guaranty Trust Company of New York, the said appellant, shall prosecute its appeal to effect,

and if it shall fail to make its appeal good, shall answer all costs, then this obligation shall be void, otherwise to remain in full force and effect.

Dated March 28, 1938.

**GUARANTY TRUST COMPANY OF
NEW YORK,**

By Kingsley Kunhardt,
Vice-President, Principal.

Attest:

(Seal) W. W. Merker,
Assistant Secretary.

**UNITED STATES FIDELITY AND
GUARANTY COMPANY,**

By S. Frank Hedges,
Attorney-in-Fact, Surety.

Attest:—

C. B. Bradbury,
Attorney-in-fact.

The within appeal Bond is hereby approved both as to form and the sufficiency of the surety thereon, this 2 day of April, 1938.

CHARLES B. DAVIS,
District Judge.

Countersigned

Joseph A. Luty,
Resident Missouri Agent.

Affidavit, Acknowledgment and Justification

By the United States Fidelity and Guaranty Company.

State of New York,

County of New York—ss.:

Before me personally came S. Frank Hedges, known to me to be Attorney-in-fact of the United States Fidelity And Guaranty Company, the corporation described in and which executed the annexed bond of Guaranty Trust Company Of New York as surety thereon, who being by me duly sworn, deposes and says that he resides in the City of New York, State of New York, and that he is the Attorney-in-fact of the said United States Fidelity And Guaranty Company, and knows the corporate seal thereof; that said Company is duly and legally incorporated under the laws of the State of Maryland; that said Company has complied with the provisions of the Act of Congress of August 13, 1894, allowing certain corporations to be accepted as surety on bonds; that the seal affixed to the annexed bond of Guaranty Trust Company Of New York is the corporate seal of the said United States Fidel-

ity And Guaranty Company, and was thereto affixed by order and authority of the Board of Directors of said Company; and that he signed his name thereto by like authority as Attorney-in-fact of said Company and that he is acquainted with C. B. Bradbury and knows him to be Attorney-in-fact of said Company; and that the signature of said C. B. Bradbury subscribed to said bond is the genuine handwriting of said C. B. Bradbury and was thereto subscribed by order and authority of said Board of Directors, and in the presence of said deponent; and that the assets of said Company, unencumbered and liable to execution, exceed its claims, debts and liabilities, of every nature whatsoever, by more than the sum of two million dollars (\$2,000,000.00).

S. FRANK HEDGES.

Sworn to, acknowledged before me, and subscribed in my presence this 28th day of March, 1938.

(Seal)

FRANCES H. HALLY,

Notary Public, King County Clerk's No. 409, Register's No. 9102.

Certificate filed in the following counties; New York Clerk's No. 511, Register's No. 9H359, Bronx Clerk's No. 43, Register's No. 138H39, Queen's Clerk's No. 1304, Register's No. 5376, Richmond County Clerk and Register, Westchester County Clerk and Register.

Term Expires March 30, 1939.

(Seal)

Stipulation as to the Evidence.

(Filed April 15, 1938.)

In the District Court of the United States, Eastern Division,
Eastern Judicial District of Missouri.

In the Matter of:

St. Louis Southwestern Railway Company, Debtor.

In Proceedings for Reorganization of a Railroad.

No. 8497.

Guaranty Trust Company of New York, as Trustee,
Appellant,

vs.

Berryman Henwood, Trustee of St. Louis Southwestern Railway Company, Debtor, St. Louis Southwestern Railway Company, and Southern Pacific Company, Appellees.

It is hereby stipulated between Guaranty Trust Company of New York, as Trustee under St. Louis Southwestern Rail-

way Company First Terminal and Unifying Mortgage dated January 1, 1912, Appellant (hereinafter referred to as the "Claimant"), and Berryman Henwood, Trustee of St. Louis Southwestern Railway Company, Debtor, St. Louis Southwestern Railway Company, and Southern Pacific Company, Appellees, that the proof of claim of said Claimant, and the protests thereto, came on for hearing on the 26th day of November, 1937, (being the first of the claims filed in this proceeding to be tried) in the District Court of the United States for the Eastern Judicial District of Missouri, Eastern Division, before the Honorable Charles B. Davis, one of the Judges thereof, and at said trial the following evidence, and none other, was offered and received in evidence; that except where objections are specifically set forth hereinbelow all of said evidence was offered and received without objection; that where only portions of exhibits are hereinafter set forth, it is hereby stipulated that the omitted portions are not material to any of the issues raised in the said proof of claim or the respective protests thereto.

Wherever the words "caption omitted" appear, it is understood the said omitted caption is the caption of the above entitled proceeding number 8497:

Claimant's Evidence.

1. Stipulation dated November 8, 1937, being as follows (caption omitted):

Stipulation in Respect to Proof of Claim of Guaranty Trust Company of New York as Trustee Under Debtor's First Terminal and Unifying Mortgage.

It Is Hereby Stipulated between Guaranty Trust Company of New York as Trustee under St. Louis Southwestern Railway Company First Terminal and Unifying Mortgage dated January 1, 1912 (hereinafter sometimes called "Claimant"), and the Protestants, Berryman Henwood, Trustee, St. Louis Southwestern Railway Company, Debtor; St. Louis Southwestern Railway Company (hereinafter called "Debtor"); and Southern Pacific Company, that for the purpose only of the trial of the issues presented by the proof of claim of Guaranty Trust Company of New York as Trustee as aforesaid, numbered 251, verified September 24, 1936, and filed herein, and the Supplement thereto verified March 12, 1937, and filed herein, and the various protests thereto and for the purpose of any appeal or appeals from the determination thereon, without prejudice, however, to the rights of any holder of the Bonds herein described who may take due proceedings to present to the Court any other claim or contentions with respect to the subject matter of this stipulation,

a competent witness or witnesses would testify as follows, subject to objections by any party as to relevance or materiality which are hereby reserved.

1. Guaranty Trust Company of New York is a corporation incorporated under the laws of the State of New York, and carrying on business at No. 140 Broadway, in the Borough of Manhattan, City, County and State of New York.

2. The above named Debtor, St. Louis Southwestern Railway Company, is a Missouri corporation, authorized to do business as a common carrier by railroad in said State and in the States of Illinois, Arkansas, Tennessee and Louisiana.

3. Said Debtor, on December 12, 1935, filed a petition for reorganization under amendatory Section 77 of the Bankruptcy Act. In and by an order of this Court dated December 12, 1935, the petition of said Debtor was approved as properly filed under said amendatory Section 77. Subsequent thereto, this Court appointed Berryman Herwood as Trustee of the property of said Debtor, who thereafter duly qualified and is now acting as such Trustee. Southern Pacific Company is a corporation incorporated under the laws of the State of Kentucky.

4. The Debtor, shortly prior to April 24, 1912, pursuant to corporate action, authorized the creation of an issue of bonds to be known as its First Terminal and Unifying Mortgage Bonds (hereinafter sometimes called the "Bonds"), to be limited in aggregate principal amount as specified in, to be issued in manner and form as provided by, and to be secured by, an indenture of mortgage on the property of the Debtor therein described. In order to secure the payment of the principal and interest of all the bonds issued and to be issued under said indenture according to their tenor and effect, and to secure the performance of all the covenants and conditions in said indenture contained, the Debtor, on or about April 24, 1912, in the United States of America, pursuant to corporate action, made and executed under its corporate seal, and delivered to Guaranty Trust Company of New York and Walker Hill, an individual citizen of the State of Missouri, as Trustees, an indenture of mortgage (herein sometimes called the "indenture"), dated January 1, 1912, a true copy of which is annexed to the proof of claim and marked Schedule A. Guaranty Trust Company of New York and Walker Hill in the United States of America duly accepted the trusts created by the mortgage and united in the execution thereof to evidence such acceptance. Walker Hill having died, Frank C. Rand, an individual citizen of the State of Missouri, was appointed and became Successor

Trustee to Walker Hill, on or about September 25, 1925, and till continues as such.

5. The following bonds were authenticated by Guaranty Trust Company of New York as Trustee under the indenture, and were by it delivered to or on the order of the Debtor, and are now held by various persons other than the Debtor, except as hereinbelow in this paragraph otherwise stated:

(1) 8,105 Bonds in the form of coupon bonds, in the form set out beginning on page 3 of the indenture (42 of which are held by the Debtor);

(2) Temporary Bonds of various denominations in the aggregate principal amount of \$3,425,000, payable to bearer, issued pursuant to Section 5 of Article First of the indenture, in the form attached to the proof of claim as Schedule B;

(3) One registered bond in the principal amount of \$10,08,000, in the form beginning on page 7 of the indenture which at the request of the Debtor has been issued in exchange for coupon bonds of a like principal amount.

6. Payments of the installments of interest payable on such Bonds on January 1, 1936, and thereafter were not and have not been made, and payments of the installments of interest payable on January 1, 1936, and thereafter, under the terms of the second mortgage of the Debtor dated February 12, 1891, were not and have not been made.

7. The Debtor has never maintained an office or agency in Amsterdam, Holland, for the payment of interest or principal on said Bonds. In reply to an inquiry of the Committee on Stock List of the New York Stock Exchange regarding payment in foreign moneys in respect of the Bonds, the Debtor, in January, 1934, notified said Exchange that the company had no foreign paying agent, and had not provided funds for the payment of coupons pertaining to the Bonds in any currency other than that of the United States; and on or about January 13, 1934, the office of the Secretary of the New York Stock Exchange published its Bulletin containing statement to that effect.

8. It is admitted that all the acts were done which are set forth in the certificate of the Bailiff at Amsterdam, Holland, which is attached to the proof of claim, and a true translation of which is attached as Exhibit A hereto; that the acts of the Claimant purporting to exercise option for payment of the said Bonds in guilders or the equivalent of said guilders in dollars consist of the things done as disclosed by the said certificate, Exhibit A hereto, and of the making and filing of

its proof of claim in this proceeding and the supplement thereto.

9. The acts done as aforesaid were done by Claimant as Trustee of the said indenture. The Claimant reserves the right to show upon the trial that at the time when Claimant did the acts mentioned in paragraph 8 hereof and filed its said proof of claim for guilders, the Claimant had been expressly authorized so to do by certain bondholders by written instruments and powers.

10. During the year 1912 the Debtor issued and sold, in the State of New York, for slightly less than the dollar face amount thereof, plus accrued interest, its First Terminal and Unifying Mortgage Bonds of a face amount (as expressed in American money) of \$8,155,000 to an original group of American purchasers, and payment therefor was received by the Debtor from said original group in money of the United States.

Prior to such issue and on March 25, 1912, the Debtor wrote to Guaranty Trust Company of New York a letter of which a copy is attached hereto as Exhibit B. On March 28, 1912, Guaranty Trust Company wrote to the Debtor a letter of which a copy is attached hereto as Exhibit C. Thereafter and for the purpose of the public offering of the bonds for sale the Debtor by its President wrote a letter to said group of purchasers which described said bonds and stated among other things:

"Referring to your purchase of \$7,500,000.00 First Terminal and Unifying Mortgage 5% Gold Bonds of St. Louis Southwestern Railway Company, I beg to advise you as follows:

These bonds are the total amount outstanding of an authorized issue of \$100,000,000.00, dated Jan. 1, 1912, maturing Jan. 1, 1952, and bearing interest at the rate of 5% per annum, payable semi-annually on January 1st and July 1st in each year, in denominations of \$1,000.00 for coupon bonds and of \$1,000.00 and multiples thereof for fully registered bonds. The coupon bonds may be registered as to principal and may be exchanged for fully registered bonds; and registered bonds may be exchanged for coupon bonds. Both principal and interest are payable at the office or agency of the railway company in the Borough of Manhattan in the City of New York, in gold coin of the United States of the present standard; coupon bonds are also payable, at the option of the holder, in London at 205 pds. 15s 2d Sterling, or in Amsterdam at 2,490 guilders, or in Berlin at 4,200 marks, D. R. W.,

or in Paris at 5,180 francs, for each \$1,000.00 of principal, and at proportionate equivalents for installments of interest. The bonds are secured by a mortgage and Deed of Trust from St. Louis Southwestern Railway Company to Guaranty Trust Company of New York and Walker Hill, Esq., of St. Louis, as Trustees.

Issue of Bonds:

The bonds, which you have purchased, are issued for the following purposes:

To acquire new terminal properties in St. Louis, Mo., and Fort Worth, Texas, at cost; title to be taken in the Trustées.....	\$ 2,250,000.00
To retire outstanding equipment obligations of an equal face value	2,165,000.00
To acquire \$400,000.00 face value of First Refunding & Extension Mortgage Bonds of Gray's Point Terminal Ry. Co., being the total amount of the issue outstanding, to be deposited with the Corporate Trustee	400,000.00
To reimburse the Company for expenditures for permanent betterments and improvements already made out of its revenues and chargeable to capital account	2,685,000.00
Total.....	\$ 7,500,000.00

Additional bonds may be issued:

(1) To refund, purchase or acquire prior mortgage bonds of a like face amount (being all the bonds of the system maturing during the life of this issue, except bonds pledged under this mortgage) as follows:

a) St. Louis Southwestern Ry. Co. 1st Consol. 4s, due 1932	\$25,000,000.00
b) Bonds of Controlled Companies	15,950,000.00
Total.....	\$40,950,000.00

(2) The remainder, \$51,550,000.00 at par for the cost of:

(a) Additions and permanent betterments, additional main track or double track, passenger and freight stations,

etc., and all of the stocks and bonds of any company owning railway, terminal or warehouse property, to an amount not to exceed \$2,000,000.00 per annum cumulative during the years 1912 to 1921, inclusive, and \$3,000,000.00 per annum cumulative thereafter (certain bonds to be issued under 1 (b) above, included in these limitations).

(b) New equipment on which these bonds shall be a direct first lien, to an amount not to exceed \$800,000.00 during the year 1912 and \$500,000.00 per annum cumulative thereafter.

(c) The acquisition or construction of additional lines of railway on which these bonds shall be a direct first lien or first collateral lien.

Prior mortgages are at present outstanding at the rate of about \$32,400.00 per mile, exclusive of trackage-right mileage, making a total mortgage debt on the property, with bonds of this issue now offered, including those issued for acquisition of terminal properties, of about \$37,275.00 per mile.

The annual interest on the bonds of this issue now offered will amount to \$375,000.00, while the interest on equipment notes to be refunded amounts to over \$100,000.00 leaving a net increase in interest of less than \$275,000.00 per annum. The earnings of the Company as appearing above, therefore, show that this additional interest charge on the average figures for the last ten years, has been earned over two and one-half times; for the year ended June 30th, 1911, about four and one-half times; and for the nine months ended March 31st last, over seven and one-half times."

Thereafter the said group of purchasers prepared and used in the public offering and sale of said bonds their prospectus describing the same and repeating the matters and things above quoted from said letter of the Debtor by its President, including among other things the following:

"Principal and interest of all bonds payable in gold in New York, and of coupon bonds also payable in London at £205 15s 2d sterling, or in Amsterdam at 2,490 guilders, or in Berlin at 4,200 marks, D. R. W., or in Paris at 5,180 francs, for each \$1,000 of principal and at proportionate equivalents for installments of interest."

Of said \$8,155,000 face amount of Bonds, \$42,000 face amount have been acquired by the Debtor and are now held by it, and \$50,000 face amount formerly held by a certain an-

nity trust were returned to the debtor and are now held by Chemical Bank & Trust Company of New York as Successor Trustee under the Debtor's General and Refunding Mortgage.

11. \$13,483,000 aggregate principal amount of the Bonds authenticated since 1912 by Guaranty Trust Company of New York as Trustee as aforesaid were delivered by it to the Debtor within the State of New York, and thereafter in 1932 were delivered in said State by the Debtor, along with \$50,000 additional of the Bonds, being a total of \$13,533,000, to The Chase National Bank of the City of New York as Trustee under the Debtor's General and Refunding Mortgage dated as of July 1, 1930, and are now held by Chemical Bank and Trust Company as Successor Trustee under said General and Refunding Mortgage.

12. Subsequent to the execution and delivery of the indenture and in accordance with the provisions thereof, the Debtor pledged and delivered to the Claimant as Trustee, other securities not specifically described in the indenture.

13. A substantial amount of said coupon bonds which remain outstanding are and were on December 12, 1935, owned and held by citizens and residents of the United States or by domestic corporations incorporated under the laws thereof, or of the States thereof.

14. On May 5, 1936, pursuant to the petition of the Debtor's Trustee, Guaranty Trust Company of New York, as Trustee under the First Terminal and Unifying Mortgage, was enjoined by the United States District Court, Eastern Division, Eastern Judicial District of Missouri, from declaring to be due and payable immediately the principal of all the First Terminal and Unifying Mortgage Bonds. The Circuit Court of Appeals for the Eighth Circuit reversed and remanded the order of injunction of the District Court by order entered on November 13, 1936. The Supreme Court of the United States denied on February 15, 1937, petition of the Debtor's Trustee for a writ of certiorari. By order of this Court dated February 24, 1937, the aforesaid injunction was dissolved, and pursuant to said order the Claimant, on February 25, 1937, served a notice upon the Trustee and the Debtor reading as follows:

St. Louis Southwestern Railway Company and Berryman Henwood, Esq., as Trustee of St. Louis Southwestern Railway Company, Debtor.

Dear Sirs:

Default having occurred under the provisions of the First Terminal and Unifying Mortgage Bonds of St. Louis South-

western Railway Company (hereinafter sometimes called the Debtor) and of the Indenture dated January 1, 1912, under which said Bonds were issued, in that, inter alia, default was made in the payment of the installment of interest payable on said Bonds on January 1, 1936; which default has continued for the space of three months and upwards and still continues, and in that default was made in the payment of the installment of interest which matured on January 1, 1936, under the terms of the Second Mortgage of the Debtor dated February 12, 1891, which default still continues:

You Will Please Take Notice that the undersigned Trustee under the above Indenture hereby declares the principal of all of the Bonds outstanding under said Indenture due and payable immediately on May 5, 1936, this notice being effective as of that date pursuant to the election of the undersigned, hereby evidenced, under the order entered February 24, 1937, by the United States District Court for the Eastern Division of the Eastern Judicial District of Missouri, In the Matter of St. Louis Southwestern Railway Company, Debtor, in proceedings for reorganization of a railroad No. 8497.

Dated, February 25, 1937.

**GUARANTY TRUST COMPANY
OF NEW YORK,**

As Trustee under the above Indenture dated January 1, 1912.

By (S.) Arthur E. Burke,
Corporate Trust Officer.

Attest:

(Seal)

(S.) F. J. McGoldrick,
Assistant Secretary."

15. The exchange value of the guilder in terms of the dollar of the United States of America was, and is to be taken as, \$.6778 on each of the following dates on which the following happened, to wit: the date on which the initial petition (Petition No. 1) was filed in this proceeding, and on which Order No. 1 was entered inter alia approving said petition as properly filed, viz., December 12, 1935; the effective date of the declaration by Guaranty Trust Company of New York, as Trustee, as of which all of the Bonds were, pursuant to the indenture, declared immediately due and payable, viz., May 5, 1936; the date on which demand and protest of nonpayment were made in Amsterdam, Hol-

and, by or in behalf of Claimant, for the payment in guilders of the principal and interest of the Bonds for which proof of claim was filed as aforesaid, and on which Claimant had made and executed its proof of claim aforesaid, viz., September 24, 1936.

The exchange value of the guilder at the date of this stipulation is \$0.5560.

16. At the time when the said bonds were issued or sold and at all pertinent times the guilder was and is the monetary unit of Holland, and the Nederlandsche Bank was and is entitled to act as its circulation bank.

During all of said time and up to the present time, the Nederlandsche Bank had the exclusive right to issue notes, and by Article I of the Law of July 18, 1904, S. 189, it is provided that so long as the Nederlandsche Bank is entitled to act as circulation bank, its notes have the quality of legal tender and lawful money; and its notes now are legal tender, except as to payments to be made by the Nederlandsche Bank itself.

The following are articles of the Law of the Kingdom of the Netherlands, of May 28, 1901, S. 132, as amended by the Laws of December 31, 1906, S. 376, July 1, 1909, S. 252, October 31, 1912, S. 324, and November 27, 1919, S. 786.

Article 1.

The currency-unit of The Netherlands monetary system is the guilder.

The guilder is divided into one hundred cents.

Article 2.

The State's coins are:

A. with the quality of legal tender:

I. up to any amount:

a. in gold:

the ten-guilders piece;
the five-guilders piece;

b. in silver:

the ryksdaalder or two and a half guilders;
the guilder;
half a guilder;

II. to a limited amount the following changes:

a. in silver:

the twenty-five cents piece;
the ten-cents piece;

b. in nickel:

the stuiver or the five-cents piece;

c. in bronze:

the two and a half-cents piece;
the cent;
half a cent.

B. without the quality of legal tender:

the gold dukaat.

Article 6.

The coins named in Article 2 have a degree of fineness, weight and diameter, with a margin allowable as regards the degree of fineness and weight, above as well as below, which have been fixed as follows:

Species of coin		Degree of fineness	
		legal thousandths	margin thousandths
Gold	(10 guilders	900	1.5
	(5 guilders	900	1.5
	(dukaat	983	1.0
Silver	(2½ guilders)		
	(guilder)	720	3.0
	(½ guilder)		
	(25 cents)		
Nickel	(10 cents)	640	4.0
Bronze	5 cents	(250 nickel	10 nickel)
		(750 copper	10 copper)
	(2½ cents	950 copper	10 copper
	(cent	40 tin	5 tin
	(½ cent	10 zinc	5 zinc

Species of coin	Weight		Diameter milli- metres	
	legal grammes	margin thousandths		
Gold	(10 guilders	6.720	2	22.5
	(5 guilders	3.360	2.5	18.0
	(dukaat	3.494	2	21.0
Silver	(2½ guilders)	25.000	4	38.0
	(guilder)	10.000	5	28.0
	(½ guilder)	5.000	6	22.0
	(25 cents)	3.575	10	19.0
	(10 cents)	1.400	15	15.0
Nickel	5 cents	4.500	Square with sides of 18 millimetres except round- ing off at cor- ners.	
Bronze	(2½ cents	4.00	one in	23.5
	(cent	2.500	every	19.0
	(½ cent	1.250	100 coins	14.0

The said articles were in full force and effect at the time when the said bonds were issued or sold and at all pertinent times and are at present in full force and effect.

At all times pertinent here, the bearer of a note issued by the Nederlandsche Bank has not been entitled to claim either gold, or gold coins; all he was and is entitled to claim was and is that his notes should be exchanged by the bank for other legal tender, and the Nederlandsche Bank was free to meet the payment of its notes in gold or silver according to its own choice. For a long period including some time prior to June 5, 1933, it has been the policy of the Nederlandsche Bank not to make payment of its notes in gold coins, and during such period it has not done so. Prior to September 27, 1936, the Nederlandsche Bank delivered gold for export whenever the exchanges on countries maintaining a market for gold reached gold export point, such deliveries for export being made to Dutch bankers and banks who undertook to furnish proof within a reasonable time that the gold had actually been delivered at the central bank of the country to which it was sent. Prior to said date exports of gold were so allowed to the United States of America. On and after September 27, 1936, by royal decree dated September 26, 1936, later confirmed by statute, Holland suspended the export of gold.

During the years 1912 and 1913, the value of the Dutch guilder in terms of the United States dollar was \$.4020. During the period from January 31, 1934, to September 27, 1936, the value of the Dutch guilder in terms of the United States dollar was \$.680567.

17. The Protestant, Southern Pacific Company, is a holder of stock of the Debtor and of a note of the Debtor in the principal amount of \$17,882,250. As partial security for said note Southern Pacific Company holds \$23,903,000 principal amount of the Debtor's General & Refunding Mortgage Five Per Cent. Gold Bonds. Said Bonds contain the promise of the Debtor to pay the holders thereof the face amount thereof, together with interest thereon, in gold coin of the United States of America of or equal to the standard of weight and fineness as it existed on the first day of July, 1930. Other bonds issued under other indentures of the Debtor contain provisions for payment in gold coin of the United States of the standard of weight and fineness prevailing at the time of issuance of such bonds, but no bonds of the Debtor other than the First Terminal and Unifying Mortgage Bonds contain a provision for alternative payment in a fixed amount of foreign moneys.

18. It is stipulated and consented that any petition, order or paper filed in the above entitled proceeding which any party hereto may desire to incorporate in the record upon the issues aforesaid, shall become a part of the record for any and all purposes, subject to the ruling of the Court upon objection of any party as to materiality or relevance.

19. The trial of the issues between the claimant, Guaranty Trust Company of New York, and the Protestants, pursuant to this stipulation, shall exclude all issues relative to the claims of those First Terminal and Unifying Bondholders (Trustees or otherwise) who have filed separate proofs of claim in this proceeding. It is agreed that the issues raised by such separate proofs of claim and the protests thereto shall be determined in trials in respect to said separate proofs of claim, provided that in case any of such proofs of claim shall be disallowed on the ground that they have not been properly or validly filed, or shall not be allowed to the full extent to which such claims would be allowed under the proof of claim and supplement thereto of Guaranty Trust Company of New York, the rights of the bondholders filing such improper or invalid claims may be determined in subsequent hearing or hearings in respect to

the proof of claim, and supplement thereto, of Guaranty Trust Company of New York.

Dated this 8th day of November, 1937.

GUARANTY TRUST COMPANY OF
NEW YORK, as Trustee as afore-
said,

By Davis, Polk, Wardwell, Gardiner &
Reed,

Its Attorneys.

BERRYMAN HENWOOD, Trustee,
St. Louis Southwestern Railway
Company, Debtor,

By A. H. Kiskaddon, Carleton S.
Hadley,

His Attorneys.

ST. LOUIS SOUTHWESTERN
RAILWAY COMPANY,

By A. H. Kiskaddon, Carleton S.
Hadley,

Its Attorneys.

SOUTHERN PACIFIC COMPANY,

By Ben C. Dey, George L. Buland,

Its Attorneys.

Exhibit A.

Impressed
Revenue Stamp
50 Cents.

This day, the twenty-fourth of September in the year nineteen hundred and thirty-six at the request of the Guaranty Trust Co. of New York, established at No. 140 Broadway, New York City, U. S. A., incorporated under the laws of the State of New York, acting in this instance in its capacity of trustee under an Indenture of Mortgage dated January 1st, 1912, and signed by the St. Louis South-Western Railway Company, incorporated under the laws of the State of Missouri, United States of America, under which Indenture have been issued bonds designated First Terminal and Unifying Mortgage Bonds, copy of which with the coupons appertaining thereto is reproduced hereby, upon which bonds there is now outstanding and unpaid principal to the extent of \$21,638,000—each of such bonds being according to its terms payable (or exchangeable for a bond that is so payable) upon election as is provided therein and in the Inden-

ture aforesaid either in New York with an amount of \$1000—gold coin of the United States of America of or equal to the standard of weight and fineness as existed on January 1st, 1912, as principal or in Amsterdam with an amount of f2490—as principal, whilst each of the aforesaid bonds yields an interest of five per cent. per annum, and each of the half-yearly interest coupons appertaining to the aforesaid bonds is payable either in New York with an amount of \$25—or in Amsterdam with an amount of f62.25;

requester, the Guaranty Trust Company of New York, representing in the said capacity the holders of the aforesaid bonds and exercising its rights arising from the said bonds and the said Indenture;

I, Nicolaas Wagenaar, bailiff, accompanied by Hendrikus Franciscus Bels, residing at Nieuwer-Amstel, and Bonifacius Minevitus Wagenaar, residing at Amsterdam, as witnesses, have made an appearance at the General Post Office of Amsterdam, situate No. 182/210 Nieuwe Zijds Voorburgwal;

and have served my writ addressing myself to and leaving copies of these presents with W. van Guldener, Ass. Postmaster at the said office;

and I, bailiff, have notified the aforesaid St. Louis South-Western Railway Company, established at No. 408 Pine Street, St. Louis, Missouri, United States of America, incorporated under the laws of the State of Missouri, U. S. A., and

Berryman Henwood, as trustee of said debtor, of like address;

that my requester is the trustee for the holders of the aforesaid bonds designated First Terminal & Unifying Mortgage Bonds, issued by the St. Louis South-Western Railway Company aforesaid, which bonds are outstanding and unpaid in the afore-mentioned amount as principal;

that the said bonds and the coupons appertaining thereto are governed by American law and that according to said law they are to be regarded as "negotiable instruments";

that the principal of and the interest on the said bonds are payable, as set forth above, in Amsterdam in guilders on the basis of the amounts and at the rates of exchange specified above;

that the place of payment in Amsterdam has not been indicated in the bonds or in the coupons or by the St. Louis South-Western Railway Company aforesaid;

that under the terms of the said bonds and the said Indenture the St. Louis South-Western Railway Company has bound itself to pay to the requester on behalf of the holders of said bonds and said coupons, in the event of default in payment as stipulated in the bonds and Indenture, the total amount due and unpaid as principal of and interest on all the outstanding bonds and coupons, the requester having the right to summon the St. Louis South-Western Railway Company to pay the said amount and to secure judgment against said Company accordingly.

that the St. Louis South-Western Railway Company is in default and has defaulted in the payment of the interest due on January 1st, 1936, and on July 1st, 1936, on the aforesaid bonds;

that the requester demands and consequently I, bailiff, Have Summoned: the aforesaid St. Louis South-Western Railway Company and the aforesaid Berryman Henwood

immediately to pay in guilders on the basis of the amounts and at the rates of exchange specified in the said bonds and coupons to my requester on behalf of the holders of said bonds and coupons at a place in the Municipality of Amsterdam to be indicated by the said St. Louis South-Western Railway Company the full amount now claimable as principal of and/or interest on the said outstanding bonds and coupons, except on such bonds and coupons as the holders thereof have made their own choice as to the currency in which payment is required;

whereupon the payment demanded was refused, the reason given for the refusal to pay being: "I shall not pay,"

I, bailiff, have further summoned the aforesaid Mr. W. van Guldener to sign this Protest, which he refused, stating as reason for his refusal that he deemed it unnecessary.

I, bailiff, therefore have a note of protest of non-payment of the afore-mentioned promissory notes to bearer.

Done in the presence of the above-mentioned witnesses, who have together with me signed this document.

The cost of these presents is f48.70.

Signed: N. WAGENAAR, bailiff,
H. F. BELS, witness,
B. M. WAGENAAR, witness.

Seen for the legalization of the signature of Nicolaas Wagenaar, bailiff,

Signed: C. G. POUW,
Notary Public.

Exhibit B.

St. Louis Southwestern Railway Company.
Office of the President.
165 Broadway

Edwin Gopld,
President.

New York March 25, 1912.

Dear Mr. Franklin:

Will you kindly confirm by letter to Mr. Arthur J. Trussel, Secretary of St. Louis Southwestern Railway Company, No. 165 Broadway, New York, our arrangements for your services as Trustee for the payment of coupons on the new First Terminal and Unifying Bonds, as follows:

The St. Louis Southwestern Railway Co. is to pay you for your services as Trustee under the Mortgage fifty cents per bond of \$1,000 each, to be paid as the bonds are issued. The road may pay the coupons on this issue through you, and in that event, the payment is to be made without cost to the road, if the money to pay the coupons is deposited with you ten days before the maturity of the coupon; except that the road will pay the actual cost of paying the coupons presented in England and Amsterdam. In England, I understand, your branch will pay them without expense, and in Amsterdam, the charge is to be one-quarter of one per cent., and the foreign exchange necessary in the transaction is to be furnished by you at a fair current rate.

Very truly yours,

WILLIAM H. TAYLOR,
Vice-President.

L. B. Franklin, Esq.,
Vice-Prest., Guaranty Trust Co. of N. Y.,
No. 28 Nassau St., New York.

Exhibit C.

March 28, 1912.

St. Louis Southwestern Railway Company First Terminal
and Unifying Mortgage 5% Bonds.

Arthur J. Trussell, Esq., Secretary,
St. Louis Southwestern Railway Company,
165 Broadway, New York City.

Dear Sir:

We are in receipt of a letter dated March 25th, from your Vice President, Mr. William H. Taylor, confirming the arrangements in connection with our services as Trustee under the new First Terminal and Unifying Mortgage, and also the arrangements with us for the payment of coupons. Your understanding as to the arrangement with us as Trustee is entirely correct, but I would call your attention to the fact that with regard to coupon payments abroad, it has been provided in the mortgage, by mutual consent, that these bonds may also be payable in French and German money, as well as English and Dutch. With this exception the terms stated in your letter are entirely correct and I hereby confirm.

Yours truly,

L. B. FRANKLIN,
Vice-President.

Filed Nov. 11, 1937. Jas. J. O'Connor, Clerk.

2. Claimant's Exhibit 1, being the First Terminal and Unifying Mortgage of the Debtor, dated January 1, 1912, annexed to the Claimant's proof of claim.

3. Claimant's Exhibits 2, 3, and 4, being Exhibits A, B, and C respectively, attached to the aforesaid stipulation of November 8, 1937.

4. Claimant's Exhibit 5, which was conceded on the record to be true photostat copies of title page and three pages of a book which is received in the Dutch courts as evidence of Dutch statutory laws; and also translations of said title page and Sections 143 and 176, being sections of the Dutch Commercial Code, and conceded on the record to be correct

translations. The portion of said Exhibit constituting said translations is as follows:

(Translation)

The Dutch Codes

as amended and supplemented to January 1, 1936,

Together with

The Laws and Decrees Most Important to Their Explanation,
with Reference to the French and Dutch Provisions
Relating to Each Article.

Published by

Mr. J. A. Fruin
Professor at Utrecht

(aided by Mr. Th. A. Fruin, Attorney at Rotterdam.)

The Hague
Martinus Nijhoff
1936.

(Translation)

176. The provisions applicable to bills of exchange in the following matters are also applicable to promissory notes to the extent that they are not incompatible with the nature of promissory notes:

The endorsement (Articles 110-119);

The due date (Article 132-136);

The payment (Articles 137-141);

The right of recourse in case of non-payment (Articles 142-149, 151-153);

The payment by third party (Articles 154, 158-162);

The duplicate of the bill of exchange (Article 166 and 167);

The loss of bills of exchange (Article 167a);

The alterations (Article 168);

The statute of limitations (Article 168a and 169-170);

The holidays, the computation of periods of time and the prohibition of days of grace (Articles 171, 171a, 172 and 173).

The provisions regarding bills of exchange payable by a third person or in a place different from the place of residence of the drawee (Article 103 and 126), the interest clause

(Article 104), the discrepancies in stating the amount due (Article 105), the consequences of the affixing of a signature under the circumstances described under Article 106, the consequences of (the affixing of) the signature by a person acting without authority or exceeding his authority (Article 107), and the letters of exchange in blank (Article 109), are also applicable to the promissory note.

The provisions regarding the guarantee (Articles 129-131) are also applicable to promissory notes; in cases where in accordance with Article 130 last paragraph the guarantee does not contain mention of the person in whose favor it is given, the guarantee is deemed to have been given in favor of the signer of the promissory note (Commercial Code former Article 209).

(Translation)

143a. The payment of a bill of exchange must be demanded, and the protest following thereupon, must be made at the residence of the drawee.

If the bill of exchange has been drawn so as to be payable in another indicated residence or by another indicated person either in the same or in a different municipality, the payment must be demanded, and the protest must be made in the place (so) indicated or with the person (so) indicated.

If the person obligated to pay the bill of exchange is totally unknown or cannot be found, the protest must be made at the post office of the residence indicated for the payment, and if there is no post office there, with the head of the local administration. The same rule applies if the bill of exchange is drawn so as to be payable in a municipality different from the municipality where the drawee resides and if the residence (in such municipality) where the payment should be made is not indicated.

143b. Protests, as well for non-acceptance as for non-payment, shall be executed and delivered by a notary, the clerk of the district judge or a bailiff. They shall be accompanied by two witnesses.

The protests shall contain the following:

1. An exact copy of the bill of exchange, of the acceptance, of the endorsements, of the guarantee and of the addresses written thereupon.

2. Mention that they (i. e. the aforementioned notary, clerk and bailiff) have requested from the persons or in the places mentioned in the preceding Section acceptance or

payment (of the bill of exchange) and have not obtained same.

3. Mention of the reasons given for refusal to accept or pay (the bill of exchange).

4. The demand to sign the protest and the reasons given for refusing (to do so).

5. Mention of the fact that the notary, court's clerk or bailiff protested against such refusal to accept or pay (the bill of exchange). If the protest relates to a bill of exchange which has been lost, a description, as accurate as possible, of the contents of the bill of exchange will suffice instead of the requirements mentioned under 1 of the preceding paragraph."

5. Claimant's Exhibit 6, being a certified copy of a resolution of the Board of Directors of the Debtor dated December 3, 1935, with respect to the omission of payments of interest due January 1, 1936, on the bonds involved in Claimant's claim, it being conceded on the record that a copy of said resolution was, about the date thereof, sent to the Claimant. Said Exhibit 6 is as follows:

(Claimant's Exhibit 6.)

"Excerpts from Minutes of Meeting of the Board of Directors St. Louis Southwestern Railway Company held in New York, December 3, 1935.

• • •

The President then stated that on the basis of estimated receipts and necessary disbursements during the month of December 1935, the Company will have on hand on December 31, 1935 the sum of \$578,500. in cash; that said amount will be insufficient to pay such interest and, if so applied, the Company will be without funds to carry on its current operations.

After discussion and upon motion duly made and seconded, it was unanimously

Resolved, That in view of the cash position of the Company as disclosed by the report of the President submitted to this meeting, the President is directed to omit payment of interest due January 1, 1936 on the following bonds, issued or guaranteed by this Company:

Second Mortgage Gold Income 4s due 1989

First Terminal and Unifying Mortgage 5s due 1952

General and Refunding Mortgage 5s due 1990

Central Arkansas & Eastern 5s due 1940

Stephenville North & South Texas 5s due 1940.

Be It Further

Resolved, that the respective trustees of the mortgages securing said bonds be notified by the Secretary of the Company of such omission of payment.

• • • • •

I, Charlton Messick, Assistant Secretary of the St. Louis Southwestern Railway Company, do hereby certify the foregoing to be a true and correct excerpt from minutes of the meeting of the board of directors of said Company held in New York on December 3, 1935.

CHARLTON MESSICK,

Assistant Secretary.

(Corporate Seal)

6. Claimant's Exhibit 7, being a notice dated June 4, 1936, of the Claimant to the holders of the bonds secured by the aforesaid First Terminal and Unifying Mortgage of the debtor, it being conceded on the record that said notice was published on June 4, 1936, in the following daily newspapers in the United States:

The Herald Tribune, New York, New York,

Chicago Daily Tribune, Chicago, Illinois,

St. Louis Globe-Democrat, St. Louis, Missouri,

The Wall Street Journal, New York, New York;

and was published on June 6, 1936, in The Times, London, England; on June 8, 1936, in a newspaper of general circulation published in Zurich, Switzerland; on June 9, 1936, in a daily newspaper of general circulation published in Amsterdam, Holland.

Said Exhibit 7 is as follows:

Claimant's Exhibit 7.

To the Holders of St. Louis Southwestern Railway Company First Terminal and Unifying Mortgage Bonds:

St. Louis Southwestern Railway Company (hereinafter called the Debtor) filed a petition for reorganization under

Section 77 of the Federal Bankruptcy Act on December 12, 1935, which was on that date approved by the United States District Court, Eastern Division, Eastern Judicial District of Missouri. A trustee of the Debtor's property has been appointed.

In each coupon bond of the above issue the Debtor promises to pay

"at its office or agency in the Borough of Manhattan, City and State of New York, One thousand Dollars in gold coin of the United States of America, of or equal to the standard of weight and fineness as it existed January 1, 1912, or in London, England, L205 15s 2d, or in Amsterdam, Holland, 2490 guilders, or in Berlin, Germany, marks 4200, D. R. W. or in Paris, France, 5180 francs, and to pay interest thereon at the rate of five per cent. per annum. from the first day of January, 1912, in said respective currencies, * * *. Payment of the principal and interest of this bond will be made, at the holder's option, at the office or agency of the Railway Company in the Borough of Manhattan, in the City and State of New York, or at designated offices in the foreign cities and countries above mentioned. * * *"

On April 6, the United States Supreme Court refused to interfere with the decision of the lower Federal Courts, in *Anglo-Continentale Treuhand, A. G. v. St. Louis Southwestern Railway Company* (81 Fed. 2nd 11), that a holder of matured coupons of the above bonds was entitled, under the circumstances in that case, to the value of guilders specified in the coupons; the rate of exchange in that case resulted in a judgment against the Debtor at the rate of approximately \$1.69 for each dollar face amount of coupons.

Events of default having occurred under the provisions of the Indenture securing these bonds, the undersigned, as Corporate Trustee, while taking steps to accelerate the maturity of the bonds, was enjoined from so doing by the Court pursuant to a petition filed by the Debtor's trustee.

In his petition and at the hearing thereon, the Debtor's trustee expressed doubt as to the proper date for fixing the rate of exchange applicable in determining the amount of dollars payable in respect of foreign moneys; and took the position that such date cannot be prior to an election to receive payment in foreign money, and furthermore, that the undersigned, as Corporate Trustee, cannot exercise in behalf of bondholders the multiple currency election in the bonds, but that such election can be exercised only by the bondholders themselves. Although the undersigned does not

of course admit the correctness of such a position, it desires to call the same to the attention of the bondholders in order that they may be in a position to take such steps in their own behalf, in making any demand and election under the multiple currency clause of the bonds (considering where any such demand should be made), in filing proof of claim, etc., as they may deem advisable.

While the Court has extended to August 1, 1936 the time for filing proofs of claim in the reorganization proceedings, the undersigned, as Corporate Trustee, intends within a short time to signify its election to receive payment in guilders, and to file proof of claim on a guilder basis, in respect of all bonds the holders of which shall not have previously acted in their own behalf. Any bondholder who has made or desires to make any election other than guilders is requested to notify the undersigned immediately, stating the election made or desired and the principal amount and number(s) of his bond(s). Nevertheless, because of the question indicated above as to the legal right of the undersigned to act in behalf of bondholders, bondholders should immediately consider what steps they deem advisable to take in their own behalf, in making demand and election under the multiple currency clause, filing proof of claim, etc.

**GUARANTY TRUST COMPANY OF
NEW YORK,**

as one of the Trustees under St. Louis
Southwestern Railway Company
First Terminal and Unifying Mortgage dated January 1, 1912.

Dated, 140 Broadway, New York, N. Y., June 4, 1936."

7. It was stipulated on the record that registered mail T-53892, containing the proof of claim of the Claimant, certified September 24, 1936, and addressed to F. H. Millard, Comptroller, St. Louis Southwestern Railway Company, Debtor, 515 Cotton Belt Building, 408 Pine Street, St. Louis, Missouri, was mailed by the Claimant on September 24, 1936, and was received by the United States Post Office in St. Louis on September 25, 1936, and was received by one C. Bieber, mail clerk and employee of the Trustee and Debtor, on the morning of Saturday, September 26, 1936, and that the said F. H. Millard, Comptroller, was present at the general office, 515 Cotton Belt Building, 408 Pine Street, St. Louis, Missouri, until 12:30 P. M., September 26, 1936, at the above address, and that said C. Bieber, mail clerk, was authorized

to receipt for mail addressed to said F. H. Millard, Comptroller. Said claim was endorsed by said F. H. Millard, as follows: "Received and filed, F. H. Millard, September 28, 1936."

8. Claimant's Exhibit 8, being a registered mail receipt for said registered item T-53892, dated September 26, 1936, signed for F. H. Millard by the said C. Bieber.

9. It was stipulated on the record that as to Exhibit A of the stipulation dated November 8, 1937, being also Exhibit No. 2 on Claimant's proof of claim, there was at the time of the execution thereof and still is attached, a form of coupon bond as appearing in the aforesaid First Terminal and Unifying Mortgage of the Debtor dated January 1, 1912, at page 3 thereof; that the Guaranty Trust Company of New York was and is the agency for payment designated by the Debtor and that the Debtor has never designated any office or agent in the United States, other than the main office of the Guaranty Trust Company in New York; pursuant to the provisions of the last paragraph of Section I, Article 3, of the said First Terminal and Unifying Mortgage; that the said Guaranty Trust Company of New York has and has had no branch office in Holland; that the First Terminal and Unifying Mortgage Bonds have been listed on the New York Stock Exchange since the year 1915, and have been actively traded in thereon since that time, and none of such bonds was on December 12, 1935, owned, or is now owned, by the parties referred to in Paragraph No. 10 of the aforesaid stipulation, dated November 8, 1937.

10. Claimant offered in evidence certain letters marked for identification as claimant's Exhibit No. 9. It was stipulated on the record that the parties signing the aforesaid letters sent the same to the claimant on or about the dates appearing thereon; that their signatures are correct; that the summoning of said witnesses is waived, and that said witnesses if present would testify to the facts set forth in said letters. Objection was made by counsel for the trustee of the debtor on the ground that said letters and testimony do not and could not constitute an election in that the letters were not addressed or communicated to the debtor or its trustee, but were communicated to a third party, namely, the claimant, and upon the second ground that said letters were not relevant as an authorization of an act done for the bondholders by the claimant; nor would such testimony be so relevant, since the alleged election made by the Guaranty Trust Company is in its capacity as trustee on the mortgage, and not on behalf of the individual bondholders writing such let-

ters. The Court thereupon reserved its ruling but, by a subsequent order, admitted said letters in evidence for whatever probative value they might have, said letters to be considered in connection with the aforesaid stipulation, and overruled the objection of the trustee for the debtor, allowing an exception thereto. The said letters were all written to the claimant after publication in June, 1936, by the claimant of its notice to bondholders in the terms contained in claimant's Exhibit 7, and stated that the writers of said letters were the owners of a certain number of bonds of the issue involved in the claim of the claimant, in most cases designating the serial numbers thereof, and announced to the claimant the desire of the writers that claim should be made in guilders. There is set forth below a list of the names, addresses and number of bonds, each of a dollar principal amount of \$1,000.00, as shown by said letters. Except where specifically stated, all letters were sent to the claimant prior to the filing of the claim.

Name	Address	No. of Bonds
Pennsylvania Mutual Life Insurance Company	Philadelphia, Pa.	1
Alfred M. Darlow, Executor of Estate of Laura M. Darlow	Rochester, N. Y.	8
The Continental Bank & Trust Company of N. Y., Trustee	New York City	1
Low Pipe & Supply Co.	Chicago, Ill.	1
The Badger State Bank	Denmark, Wis.	5
Bank of Clarkson	Clarkson, Ky.	4
Antonia C. Hewitt	c/o R. L. Day & Co., 14 Wall St., New York City	10
University of Rochester	Rochester, N. Y.	139
The First National Bank of Portland	Portland, Ore.	5
American National Insurance Company	Galveston, Tex.	15
The First-Mechanics National Bank of Trenton	Trenton, N. J.	20
National Commercial Bank & Trust Company, Trustee for Bernard L. Patterson	Albany, N. Y.	1
Albert E. Greeng	415 E. William St., Ann Arbor, Mich.	1

F. Henry Koch	Jennings, St. Louis Co., Mo.	2
C. D. Penniston and wife, Mary B.	Salt Lake City, Utah	1
Emma B. Sweet	c/o Security Trust Company of Rochester Rochester, N. Y.	1
York Trust Company	York, Pa.	5
Mary H. Heenan	Asbury Park, N. J.	3
George Buchanan	c/o The Citizens State Bank, Sheboygan, Wis.	1
C. A. Eckburg	c/o The Citizens State Bank, Sheboygan, Wis.	2
C. E. Garton	c/o The Citizens State Bank, Sheboygan, Wis.	5
Charles Morris Howard	Baltimore, Md.	3
Mrs. Ella Longstreth Supplee	c/o Corn Exchange National Bank and Trust Company Philadelphia, Pa.	5
Myrtle P. Cowan	c/o South Texas Commercial Bank, Houston, Tex.	10
Charles F. Doering	Daytona Beach, Fla.	3
The First-American Bank & Trust Company	Middletown, Ohio	5
Farmers Savings Bank	Mineral Point, Edmund, Wis.	2
E. A. Bauer	Los Angeles, Calif.	2
Bank of Prairie Du Sac	Prairie du Sac, Wis.	27
Edward B. Smith & Co.	Boston, Mass.	2
John Dano	Scranton, Pa.	4
Merchants & Farmers State Bank	Marathon, Wis.	3
The First National Bank of Hancock	Hancock, N. Y.	7
Union State Bank	Kewaunee, Wis.	3
Mrs. Theodore D. Bratton	Jackson, Miss.	5
Metals Bank & Trust Co.	Butte, Montana	25
First National Exchange Bank of Roanoke, Co-Executor of estate of Paul Massie (Letter dated Sept. 29, 1936)	Roanoke, Va.	10

First National Exchange Bank
of Roanoke, Custodian for
Jean Carrington Hartsook
(Letter dated Sept. 29, 1936) Roanoke, Va.

1

First National Exchange Bank
of Roanoke, Guardian for
Caroline Hartsook
(Letter dated Sept. 29, 1936) Roanoke, Va.

1

11. Certain petitions and orders on file and appearing in the printed record in the said proceeding number 8497 in the said United States District Court were introduced in evidence, and the following constitute summaries thereof, stipulations with reference thereto, or excerpts therefrom, the caption being in all cases omitted:

(a) On December 12, 1935, the Debtor verified and filed Petition No. 1 in these proceedings in which, inter alia, it alleged that there would become due on January 1, 1936, the semi-annual interest on the Debtor's aforesaid First Terminal and Unifying Mortgage Bonds, on its Second Mortgage Bond Certificates and on various other of its obligations; and "that the Debtor is without funds to pay and discharge the aforesaid obligations as they mature * * *; that it is unable to meet its debts as they mature, and desires to effect a plan of reorganization, pursuant to Section 77 of Chapter VIII of the Acts of Congress relating to Bankruptcy as amended"; and therein the Debtor prayed that an order be entered approving the petition as properly filed under said Section 77, and "that the court take and exercise its jurisdiction over the property and affairs of the Debtor and make such orders and enter such judgments and decrees from time to time as may be proper, necessary or incidental to the reorganization of the property, debt and corporate structure of said Debtor."

(b) On December 12, 1935, the District Court of the United States, Eastern Division, Eastern Judicial District of Missouri, signed, and there was filed, Order No. 1 in these proceedings approving the aforesaid petition as properly filed under said Section 77. Paragraph 7 of said order, as amended by Order No. 10, filed in said proceedings on December 28, 1935, orders:

"That all persons, firms and corporations, whatsoever, and wheresoever situated, located or domiciled, hereby are restrained and enjoined from interfering with, attaching, garnisheeing, levying upon, and enforcing liens upon, or in

any manner whatsoever disturbing any portion of the assets, goods, money, railroads, properties and premises belonging to, or in the possession of the Debtors, or from taking possession of or in any way interfering in any manner to prevent the discharge by the Debtors of their duties in the operation of said property and business, under the orders of this Court, and that the commencement of new suits and the continuation of pending suits against the Debtors, or any of them, are hereby stayed and enjoined until after final decree in these proceedings; Provided, however, that suits or claims for damages caused by the operation of trains, buses, or other means of transportation may be filed and prosecuted to judgment in any court of competent jurisdiction, and any order heretofore staying the prosecution of any such causes of action or appeals thereof is hereby vacated."

(c) Order No. 28, dated February 5, 1936, the following portions:

"It Is Ordered:

"1. That the 1st day of June, 1936, be, and it hereby is, fixed as the reasonable time within which the claims of creditors of St. Louis Southwestern Railway Company, St. Louis Southwestern Railway Company of Texas, Central Arkansas and Eastern Railroad Company and Stephenville North & South Texas Railway Company, Debtors herein, including claimants in tort whose claims accrued prior to December 12, 1935, may be filed or evidenced and after which no claim not so filed or evidenced may participate, provided, however, that claims arising out of the Trustee's disaffirmance of a contract after May 1st, 1936, may be filed within thirty days after notice of such disaffirmance is given.

"2. That each claim shall be filed in duplicate with F. H. Millard, Comptroller of the Debtors, 515 Cotton Belt Building, 408 Pine Street, St. Louis, Missouri, who is hereby directed immediately to stamp the date of receipt thereon and acknowledge receipt of the same.

* * * * *

"4. That the trustee or trustees under any mortgage, deed of trust, or indenture outstanding against the estates of the respective Debtors, or against any portion thereof, may, within the time hereby prescribed, file a verified claim in behalf of all bonds or securities outstanding under such mortgage, deed of trust, or indenture, in which event it shall be unnecessary for the holders of such bonds or securities to file claims in their own behalf."

(d) On February 29, 1936, Anglo-Continentale Treuhand, A. G., filed herein its Petition to Intervene (Petition No. 39) alleging, inter alia, that it was a foreign corporation organized and existing under the laws of the Principality of Liechtenstein and the bona fide owner of 685 coupon bonds of the aforesaid issue, and alleging that:

"8. After January 1, 1934, when 36 of said coupons became due and payable, your petitioner attempted to present said coupons at the office or agency of the above named debtor in Amsterdam, Holland, for the purpose of demanding payment with respect to each coupon of 62.25 guilders, or a total of 2,241 guilders, and your petitioner was informed that said debtor did not maintain an office or agency in Amsterdam and had made no provision for payment of the said coupons, and on or about January 11, 1934, said debtor advised the committee on Stock List of the New York Stock Exchange in reply to its inquiry regarding payment in foreign exchange of interest coupons on its First Terminal and Unifying Mortgage 5% bonds due 1952 that it had no foreign paying agent and had provided no funds for the payment of coupons in any currency other than that of the United States.

"9. Your petitioner thereafter demanded of said debtor payment of said coupons in guilders, as provided in said coupons, or in lieu thereof its equivalent in legal tender of the United States of America.

"10. Said debtor refused to pay said coupons in guilders, as provided in said coupons, and denied liability under said coupons in any amount in excess of Twenty-five Dollars (\$25.00) legal tender of the United States of America for each coupon, contending that the Joint Resolution of Congress adopted June 5, 1933 (Title 31, U. S. C. 463) relieved said debtor of its obligation to pay the coupons in guilders in Amsterdam, Holland, or its equivalent in legal tender of the United States of America.

"11. Thereafter your petitioner filed suit against said debtor on said coupons due January 1, 1934, and July 1, 1934, and January 1, 1935, in the New York Supreme Court, New York County, said suit being for damages for breach of contract, the amount sought being the value in dollars of 62.25 guilders for each coupon as provided in said coupons. Said suit was thereafter removed by said debtor, defendant therein, to the United States District Court for the Southern District of New York. Said debtor, defendant in said suit, filed answer therein, alleging that said joint resolution of

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Congress, hereinbefore mentioned, relieved it of any obligation to pay any sum except the sum of Twenty-five Dollars (\$25.00) in legal tender of the United States of America. Upon motion by your petitioner, plaintiff in said suit, said defense was stricken, and summary judgment on the complaint in favor of plaintiff therein was rendered in said cause. Defendant therein appealed from said judgment and said judgment was thereafter affirmed by the United States Circuit Court of Appeals for the Second Circuit on January 13, 1936."

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"20. By reason of the foregoing matters and things, and under the provisions of said mortgage hereinbefore referred to, said trustee of said mortgage is given the right, upon the written request of the holders of twenty-five percent (25%) in amount of said First Terminal and Unifying Mortgage bonds then outstanding, to declare the principal of all said bonds then outstanding to be due and payable immediately.

"Upon information and belief your petitioner states that said trustee has not yet declared the principal due."

"21. Your petitioner further states that by reason of the happening of the events of default as hereinbefore mentioned said trustee of said mortgage, under the terms of said mortgage (subject, however, to any rights which may exist under and by virtue of mortgages constituting liens prior to the lien of said First Terminal and Unifying Mortgage) has the right to exercise the right of entry therein conferred and to proceed to protect and enforce its rights and the rights of the holders of said First Terminal and Unifying Mortgage bonds in the manner described in said mortgage."

.

"23. In order that the interest of your petitioner and all other bondholders similarly situated be properly protected, and to enable them to appraise any plan of reorganization of the debtor which may be submitted for their acceptance; and in order to enable this court to take appropriate action in respect of any application which may be made for approval or confirmation of such plan, it is appropriate that the extent and priority of the lien of the First Terminal and Unifying Mortgage and the amounts due and to become due upon said First Terminal and Unifying Mortgage bonds and coupons thereunder be ascertained, and the manner of payment be ascertained and decreed by this Court, and that your petitioner be permitted to intervene in its own behalf and on

behalf of all other bondholders similarly situated in order that it may have notice of and be informed concerning any and all applications which may be made to this Court affecting the trusts and in order that it may have an opportunity to be heard in connection therewith.

"Wherefore, your petitioner prays:

"1. That leave be granted to it to intervene in the above entitled cause, on its own behalf, and on behalf of all other bondholders similarly situated for the purpose of protecting its rights under said First Terminal and Unifying Mortgage and its rights under the terms of said bonds and coupons issued thereunder which it now owns.

"2. That it be adjudged and decreed by this Court that the amounts now due and which may hereafter become due your petitioner and all other bondholders similarly situated under the terms of said First Terminal and Unifying Mortgage and said bonds and coupons secured thereunder is the number of guilders set out in said bonds and coupons or the value in legal tender of the United States of the amount of guilders named in said bonds and coupons, and that any plan of re-organization approved by this Court shall be on the basis of payment in said amounts."

On April 15, 1936, Anglo-Continentale Treuhand, A. G., filed herein its Amended Intervening Petition (Petition No. 57) which, inter alia, repeated in substance the allegations and prayers of Petition No. 39.

On April 21, 1936, Anglo-Continentale Treuhand, A. G., filed herein its Supplemental Intervening Petition (Petition No. 58) which, inter alia, repeated in substance the allegations and prayers of Petition No. 39, and prayed that it be granted leave to intervene for the purpose of protecting its rights and the rights of other bondholders similarly situated "so far as relates to the right, power, and duty of the Guaranty Trust Company of New York as Trustee, or the bondholders, to declare the principal of said bonds to be due and payable immediately, and so far as relates to the right of said Corporate Trustee [Guaranty Trust Company of New York] and your petitioner and other bondholders to demand and receive the various sums of foreign money in said Indenture and in said bonds and coupons set forth or damages in American money in lieu thereof."

(e) Petition No. 46, being as follows (omitting caption):

(Motion of Berryman Henwood, Trustee, etc., to dismiss Intervening Petition of Anglo-Continental Treuhand, A. G.)

(Petition No. 46.)

In the District Court of the United States, Eastern Division,
Eastern Judicial District of Missouri.

In the matter of

St. Louis Southwestern Railway Company, Debtor,

In Proceedings for reorganization of a Railroad.

No. 8497.

Now comes Berryman Henwood, Trustee of the property of St. Louis Southwestern Railway Company, Debtor, and moves to dismiss the intervening petition of Anglo-Continental Treuhand, A. G., upon the following grounds:

1. That said petition fails to state facts sufficient to constitute a valid reason or reasons why said petitioner is entitled to the relief or any of the remedies prayed for in said intervening petition.

*2. That an individual bondholder should not be permitted to intervene in this proceeding, generally or specially, and that if such right should be granted to said petitioner, it would be difficult to deny such right to other bondholders, and that if numerous individual bondholders or other creditors should be allowed to intervene, this proceeding would become so cumbersome and complicated as to make impossible the preparation and consummation of a plan of reorganization, thus defeating the purpose of amendatory Section 77 of the acts of Congress relating to bankruptcy.

3. That the mortgage trustee of St. Louis Southwestern Railway Company First Terminal and Unifying Mortgage has the right to represent the interests of all bondholders thereunder, and that by its said petition petitioner seeks to usurp the prerogative of said mortgage trustee, not only as to its own interests, but as to those of all bondholders under said mortgage.

4. That the filing of said petition constitutes a violation of the terms of the First Terminal and Unifying Mortgage of said Debtor and especially Section 18 of Article Fourth thereof, which section reads as follows:

"No holder of any first Terminal and Unifying Mortgage Bond or coupon shall have any right to institute any suit, action or proceeding in equity or at law for the foreclosure of this indenture, or for the execution of any trust here-

under, or for the appointment of a receiver, or for any other remedy hereunder, unless such holder previously shall have given to the Trust Company written notice of such default and of the continuance thereof, as hereinbefore provided, nor unless also the holders of fifteen per cent in amount of the First Terminal and Unifying Mortgage Bonds then outstanding shall have made written request upon the Trust Company, and shall have afforded to it a reasonable opportunity either to proceed to exercise the powers hereinbefore granted, or to institute such action, suit or proceeding in its own name; nor, unless, also, they shall have offered to the Trust Company security and indemnity satisfactory to it against the costs, expenses and liabilities to be incurred therein or thereby; and such notification, request and offer of indemnity are hereby declared in every such case, at the option of the Trust Company, to be conditions precedent to the execution of the powers and trusts of this indenture and to any action or cause of action for foreclosure or for the appointment of a receiver or for any other remedy hereunder; it being understood and intended that no one or more holders of First Terminal and Unifying Mortgage Bonds and coupons shall have any right in any manner whatever by his or their action to affect, disturb or prejudice the lien of this indenture, or to enforce any right hereunder, except in the manner herein provided, and that all proceedings at law or in equity shall be instituted, had and maintained in the manner herein provided and for the equal benefit of all holders of such outstanding bonds and coupons."

5. That the mere failure of the mortgage trustee of said First Terminal and Unifying Mortgage to file an intervening petition in this proceeding is insufficient to justify the granting of an intervention to said petitioner, either to represent itself or to represent other or all bondholders under said mortgage.

*6. That the petition fails to allege the failure or refusal of the mortgage trustee under said First Terminal and Unifying Mortgage properly to discharge its trust, and that in the absence of such failure upon proper demand made in accordance with the terms of the mortgage, said trustee is the sole representative of the bondholders; and that there is no justification either in said mortgage or at law or equity for allowing said petitioner to intervene in this cause.

7. That petitioner has shown no cause or reason why the said mortgage trustee cannot fully represent the interests here sought to be asserted by the petitioner, including the interests of the petitioner.

8. That amendatory section 77 of the acts of Congress relating to bankruptcy, grants creditors the right to be heard upon all questions arising in the proceeding, including a plan of reorganization, without filing a petition to intervene, and that the granting of intervention, general or special, is unnecessary to give said petitioner or any other creditor or a mortgage trustee any essential right in connection with this proceeding.

9. That if intervention be said petitioner should be deemed essential in order that petitioner might be heard on a plan of reorganization, any petition therefor is premature and inappropriate at this time, because no plan of reorganization has been approved by the Interstate Commerce Commission, and until so approved no plan can come before the Court for confirmation, and because no plan of reorganization has been filed and none is required to be filed before July 1, 1936.

*10. That the granting to said petitioner of a right to intervene, either generally or specially, requiring all notices to be served on said petitioner in respect of administrative steps and other matters in this cause would unnecessarily impede and increase the costs of this proceeding.

11. That said petitioner has wholly failed to show cause for intervention in this proceeding.

And trustee further moves for such other and further relief as may be just, including an enlargement of his time to answer until twenty days after the service upon said Trustee of an order upon the decision of this motion, in the event this motion or any part thereof should be denied.

Respectfully submitted,

BERRYMAN HENWOOD,

Trustee,

ST. LOUIS SOUTHWESTERN
RAILWAY COMPANY,

Debtor.

By A. H. Kiskadoun,

General Counsel.

Carleton S. Hadley,

Assistant General Counsel, 509 Cotton
Belt Building, St. Louis, Missouri.

Dated March 19, 1936.

Filed Mar. 19, 1936. Jas. J. O'Connor, Clerk.

(f) Berryman Henwood, Trustee of the property of St. Louis Southwestern Railway Company, repeated in substance the above quoted statements of his Petition No. 46, in his subsequent petitions No. 63, dated May 4, 1936, motion to dismiss the amended intervening petition of Anglo-Continentale Treuhand, A. G.; No. 65, dated May 7, 1936, motion to dismiss the supplemental intervening petition of Anglo-Continentale Treuhand, A. G.; No. 92, dated June 10, 1936, amended motion to dismiss the supplemental intervening petition of Anglo-Continentale Treuhand, A. G.

(g) Order No. 156, being as follows (omitting caption):
Order Sustaining (1) Motion of Trustee to Dismiss Amended Intervening Petition of Anglo-Continentale Treuhand, A. G., and (2) Amended Motion of Trustee to Dismiss Supplemental Intervening Petition of Anglo-Continentale Treuhand, A. G.

The motion of Berryman Henwood, Trustee, to dismiss the amended intervening petition of Anglo-Continentale Treuhand, A. G., and the amended motion of Berryman Henwood, Trustee, to dismiss the supplemental intervening petition of Anglo-Continentale Treuhand, A. G., being this day presented to the Court, and the Court having heard the arguments of counsel on said motions, and it appearing to the Court that it is in the best interest of the trust estates of the Debtors that said motions be sustained, and the Court being fully advised of the premises,

It Is Ordered:

That the said motions of Berryman Henwood, Trustee, and the same are hereby sustained by the Court, and the said amended intervening petition and supplemental intervening petition of Anglo-Continentale Treuhand, A. G., are hereby dismissed, and intervention, either special or general, of Anglo-Continentale Treuhand, A. G., is hereby denied.

CHARLES B. DAVIS,
District Judge.

Dated January 2, 1937.

Filed Jan. 2, 1937. Jas. J. O'Connor, Clerk.

(h) Petition No. 56, dated April 10, 1936, the following portions:

"Now comes Berryman Henwood, Trustee of the property of the Debtor St. Louis Southwestern Railway Company, and respectfully represents to the Court:

8. That there were duly issued for a valuable consideration and are now outstanding under the Mortgage \$21,638,000 of bonds of the St. Louis Southwestern Railway Company, which bear interest at the rate of 5% per annum and mature on January 1, 1952, and which, with their appurtenant unpaid coupons now are the lawfully created, valid and existing obligations of the Debtor and entitled to the lien and security of the Mortgage, and are in the hands of numerous bona fide holders for value or are held as pledged securities by certain pledgees or under certain trust agreements.

That, in your Trustee's opinion, such acceleration of the maturity of said First Terminal and Unifying Mortgage Bonds might fix the rate of exchange in regard to payment of said bonds and interest coupons in the currencies of England, Holland, Germany and France and thereby establish the amount of the ultimate liability of the Debtor with respect to said bonds and interest coupons, all in conflict with the provisions, purpose and intention of said amendatory Section 77, and in derogation of the interests of other creditors of the said Debtor and the creditors of other Debtors herein, and that such acceleration might, and in all probability would, create a number of different classifications of bondholders having different and varied claims contrary to the provisions, purpose and intent of said amendatory Section 77."

(This is the petition referred to in Paragraph 14 of the stipulation of November 8, 1937, upon which the order of injunction of May 5, 1936, was entered.)

(i) Order No. 73, dated May 15, 1936, the following portions:

"It Is Ordered:

"1. That the time within which the claims of creditors of St. Louis Southwestern Railway Company, St. Louis Southwestern Railway Company of Texas, Central Arkansas and Eastern Railroad Company, and Stephenville North & South Texas Railway Company, Debtors herein, including claimants in tort whose claims accrued prior to December 12, 1935, may be filed or evidenced and after which no claim not so filed or evidenced may participate, is hereby extended from June 1, 1936 to August 1, 1936, provided, that, except as hereby amended, Order No. 28, entered herein on February 5, 1936, shall be and remain in full force and effect."

(j) Petition No. 81 of Berryman Henwood, Trustee of the Debtor; dated May 22, 1936, the following portion:

"13. That there are outstanding \$21,638,000 principal amount of St. Louis Southwestern Railway Company First Terminal and Unifying Mortgage 5% Bonds, maturing on January 1, 1952, secured by a mortgage which is a lien on property in the principal Debtor's estate, and under which the Guaranty Trust Company of New York is one of the Trustees, of which there are \$8,063,000 owned by the public; \$13,333,000 pledged by the principal Debtor under one of its mortgages, and \$42,000 held in annuity trusts."

(k) Order No. 81, dated May 22, 1936, the following portions:

"Upon due consideration of the verified petition of the debtors and the Trustee with respect to the filing of proofs of claim and of evidence of interest relating to the claims and securities referred to in the said petition, and pursuant to the provisions of sub-division (c) (7) of amendatory Section 77 of the Acts of Congress relating to bankruptcy, the court being fully advised in the premises,

"It Is Ordered:

"1. That each mortgage trustee or trustees designated below is authorized to file on or before August 1, 1936, a claim verified on information and belief, on behalf of the securities outstanding under the respective instruments under which they are acting:

"Guaranty Trust Company of New York, Trustee:

"St. Louis Southwestern Railway Company First Terminal and Unifying Mortgage 5% Bonds, maturing on January 1, 1952 (covered by paragraph 13 of said petition).

"Stephenville North & South Texas Railway Company First Mortgage 5% Thirty Year Gold Bonds, maturing on July 1, 1940 (covered by paragraph 18 of said petition).

"Paragould Southeastern Railway Company First and Refunding Mortgage 5% Thirty-Year Gold Bonds, maturing January 1, 1944 (covered by paragraph 25 of said petition).

(This paragraph also mentions four other corporate mortgage trustees with respective mortgages designated.)

"2. That each claim filed in accordance with Paragraph 1 of this Order shall be for the account and benefit of the holder of the securities outstanding under the applicable indenture, as their respective rights, title, and interest may hereafter be established and determined under orders hereafter to be entered in these proceedings, and where claims are filed by

the mortgage trustee or trustees, pursuant to the provisions of this order, it shall be unnecessary for the holders of the securities to file claims in this proceeding in their own behalf. Pledged bonds and treasury bonds not released of record shall be included in any such claim, but if any of the bonds or securities referred to in such claim is known or believed by the trustee or trustees filing the claim to have been paid or retired, but not yet satisfied of record, the facts relating thereto shall be stated.

"Claims filed under said Paragraph 1 need only set forth the aggregate amount of the securities outstanding under the applicable indenture;

"5. That claims now or hereafter filed or evidenced under Order No. 28 or this Order shall be for the account and benefit of the holders of bonds, debentures and other securities designated above as their respective rights, title and interest may be established and determined hereafter in these proceedings. The sale, assignment or transfer of any bond, debenture or other security (except stock) in respect of which a claim shall have been filed in these proceedings, and of the claim thereon in these proceedings, shall be sufficiently proved for any purpose by the production of such security by a transferee or assignee (a) in bearer form or (b) registered as to principal in the name of such transferee or to bearer or (c) registered as to principal and interest in the name of such transferee or (d) registered as to principal and interest or registered as to principal, and duly endorsed in blank or to such assignee, or accompanied by appropriate instruments of assignment and transfer in blank or to such assignee, with signatures guaranteed in either case."

"6. That any party to these proceedings or anyone else having a substantial interest, upon leave of Court for cause shown may, within sixty days of the filing of any claim hereafter filed pursuant hereto, protest the claim as filed or evidenced for the reasons to be fully stated in such protest."

(1) Order No. 104, dated July 6, 1936, the following portion:

"It Is Ordered:

"1. That the time within which the claims of creditors of St. Louis Southwestern Railway Company, St. Louis Southwestern Railway Company of Texas, Central Arkansas and Eastern Railroad Company, and Stephenville North & South Texas Railway Company, Debtors herein, including claimants in tort whose claims accrued prior to December 12, 1935, and including claimants who may file claims under Order 81,

entered herein on May 22, 1936, may be filed or evidenced and for which no claim not so filed or evidenced may participate, is hereby extended from August 1, 1936, to October 1, 1936, provided, that, except as hereby amended, Order No. 81 entered herein on February 5, 1936, and Order No. 81 entered herein on May 22, 1936, shall be and remain in full force and effect."

(m) Petition No. 111, being as follows (omitting caption):
"Petition of Trustee for Order Stating that Securities Need Not Be Filed With Proofs of Claim."

The petition of Berryman Henwood, Trustee, respectfully presents:

That, in addition to the claims of mortgage trustees, individual security holders in many instances are filing proofs of claim on certain securities, and that your Trustee has received numerous inquiries from individual security holders as to whether it is necessary to annex their securities to the proofs of claim so filed.

That Order No. 81 (Printed Record, page 777), entered herein on May 22, 1936, provides that claims filed by mortgage trustees under paragraph 1 of said order need not annex the original or a copy of the mortgage, deed of trust, or other indenture, if any, respecting which the claims are made, or of the securities thereunder, but that said order is silent as to the filing of claims by individual security holders. That Order No. 28 (Printed Record, page 257) entered herein on February 5, 1936, also is silent as to the necessity of annexing securities.

That your Trustee is of the opinion that individual security holders should follow the provisions of Orders Nos. 28 and 81 in preparing and filing claims which they may desire to file herein, and that they should not be required to annex their securities to proofs of claim or otherwise to file said securities.

Wherefore, Trustee prays that an order be entered herein providing that securities need not be filed with proofs of claim by individual security holders.

BERRYMAN HENWOOD,

Trustee.

Kiskaddon,
General Counsel;
W. S. Hadley,
Assistant General Counsel,
Cotton Belt Building,
St. Louis, Missouri.
Filed September 9, 1936.

United States of America,
Eastern Judicial District of Missouri,
Eastern Division,
City of St. Louis, Missouri—ss.

Berryman Henwood, being duly sworn, upon his oath says that he has read the above and foregoing petition and that the facts therein stated are true, as he verily believes.

BERRYMAN HENWOOD.

Subscribed and sworn to before me this 4 day of September, 1936.

THEO. R. SCHNEIDER,

(Seal)

Notary Public.

My Commission expires August 2, 1937.

Filed Sept. 9, 1936. Jas. J. O'Connor, Clerk.

(n) Order No. 111, being as follows (omitting caption):

Order That Securities Need Not Be Filed With Proofs of Claim.

The petition of Berryman Henwood, Trustee, for an order stating that securities need not be filed with proofs of claim being this day presented to the Court, and the Court being fully advised in the premises,

It Is Ordered:

That the said petition of the Trustee be and the same hereby is approved, and that persons filing individual proofs of claim on securities need not annex to said proofs of claim the original securities or copies thereof, or otherwise file said securities in this Court or with the Trustee or F. H. Millard, Comptroller.

CHARLES B. DAVIS,

District Judge.

Dated September 9, 1936.

Filed Sept. 9, 1936. Jas. J. O'Connor, Clerk.

(o) Judgment upon mandate from the United States Circuit Court of Appeals, Eighth Circuit, in Cases No. 10,679 and 10,687 in Bankruptcy. The following portion:

"Now, Therefore, It Is Ordered, Adjudged and Decreed that the injunction heretofore entered on May 5, 1936, against

Guaranty Trust Company of New York as Trustee under First Terminal and Unifying Mortgage of St. Louis Southwestern Railway Company is hereby dissolved; that the petition of Berryman Henwood as Trustee of the Debtor, filed April 11, 1936, upon which said injunction was granted, is hereby dissolved, and it is further ordered, adjudged and decreed that Guaranty Trust Company of New York as Trustee under First Terminal and Unifying Mortgage of St. Louis Southwestern Railway Company dated January 1, 1912, is hereby authorized to declare the principal of any or all of St. Louis Southwestern Railway Company First Terminal and Unifying Bonds issued under the provisions of said mortgage and now outstanding to be due and payable either immediately or, at the election of said Guaranty Trust Company of New York as Trustee, as of May 5, 1936, said declaration to be effective as though made on May 5, 1936, and to serve notice in writing of said declaration upon the Debtor and the Trustee of the Debtor and upon any other person or corporation subject to the jurisdiction of this Court, said notice or notices, at the election of said Guaranty Trust Company of New York as Trustee, to be considered as though served on May 5, 1936, and to be effective as of said date; and it is further ordered that the Trustee of said Debtor shall pay to the Clerk of the United States District Court out of the estate of said Debtor the sum of \$194.35 awarded as costs against said Trustee in the United States Circuit Court of Appeals, and that all costs of said proceeding in this Court shall be charged against the estate of the Debtor."

(p) Petition No. 189 of Berryman Henwood, Trustee of the Debtor. That portion stating that "St. Louis Southwestern Railway Company has never maintained an office or agency in Amsterdam, Holland, and that since December 12, 1935, said Debtor has not been able to pay and has not paid the principal or interest on said bonds or any of them," (referring to the bonds secured by the aforesaid First Terminal and Unifying Mortgage dated January 1, 1912). Said petition was filed by the Trustee of the Debtor on April 12, 1937, but was subsequently withdrawn by leave of Court.

2. There were introduced in evidence the proof of claim of the Claimant, together with all exhibits attached thereto, and the supplement to said proof of claim. Said documents are not herein set forth, as they are elsewhere set out in full in the record.

Appellees' Evidence.

F. H. MILLARD testified on behalf of the Trustee of the Debtor and of the Debtor as follows:

Direct Examination.

My name is F. H. Millard. I am the Comptroller of the St. Louis Southwestern Railway Company, Debtor, and am also acting as agent for the Trustee. I know that prior to July 1, 1935, the St. Louis Southwestern Railway Company did not pay any of the coupons on its First Terminal and Unifying Mortgage Bonds in guilders. I know of no requests for such payments by the St. Louis Southwestern Railway Company being made prior to said date, either to me or to other officers of said railroad. No such requests were received by me.

Over objections by counsel for Claimant as to materiality (but not as to the competency of the witness) and exceptions taken to the overruling thereof, the witness testified that he could state from his records what the \$8,155,000 of First Terminal and Unifying Mortgage Bonds were sold for by the company in 1912, and that the price was \$835.00 for each \$1,000.00 principal amount of the First Terminal and Unifying Mortgage Bonds.

I know from my records where the First Terminal and Unifying Mortgage Bonds now outstanding in the hands of the public were held on July 1, 1935.

Over objections that the testimony was immaterial, irrelevant, and incompetent, made by counsel for the Claimant, and exceptions taken to the overruling of said objections, the witness testified that 1,729 individuals or corporations, residents of the United States, held par value of \$7,343,000 of First Terminal and Unifying Mortgage Bonds on July 1, 1935; and that, as to the total number of bonds held on July 1, 1935, by residents of foreign countries, that outside of the United States, 38 holders held \$716,000 par value of said bonds; that in his answer he had included as a foreign holder one holder of one bond in Alaska; that the other holders outside of the United States were: one holder in Belgium, 2 bonds; four holders in Canada of a total of 19 bonds; one holder in Czechoslovakia of 1 bond; two holders in England of a total of 7 bonds; four holders in France of a total of 6 bonds; three holders in Holland of a total of 27 bonds; one holder in Italy of 2 bonds; one holder in Liechtenstein of 610 bonds; one holder in Newfoundland of 1 bond; one holder in Nicaragua of 5 bonds; eighteen holders in Switzerland of a total of 35 bonds.

Arrangements have been made for claimants on these bonds to file their claims with me as Comptroller and Agent of the Trustee. The claim on the 610 bonds held in Liechtenstein by the Liechtenstein Corporation has been filed with me. These bonds which I have enumerated as being held by residents of the United States and residents of foreign countries are not all of the outstanding issue of said bonds. There are four bonds whose holders I am not able to identify, four \$1,000 bonds.

• Cross-Examination.

As to how I know where these holders reside, we made arrangement with the paying agent to have all of the ownership certificates passed through our hands at the time the coupons were paid. This paying agent was the Guaranty Trust Company. That arrangement was made with respect to the coupons of July 1, 1935, and not previous to that time that I know of. No such arrangement to ascertain the residence of bondholders was made with respect to any maturity previous to July 1, 1935, as far as I know.

I have been Comptroller seventeen years. I did not know why no such inquiry was made prior to July 1, 1935. I know why it happened to be made six months before the default of these bonds. The notes which are also in default matured on June 1, 1935, at which time we were uncertain whether we would be required to go into bankruptcy or not, and we took the step of determining as best we could the holders of all our bonds, not only this issue, but all of them, as of the nearest coupon date to June 1, 1935.

All that I know is who presented the coupons on July 1, 1935. As to knowing who beneficially owned the coupons presented, we have no information beyond the ownership certificates. We have an ownership certificate with each group of coupons presented. We have no means of knowledge of the beneficial owners of these bonds in 1934 or any previous year.

I have received claims pursuant to the Court's order in its reorganization, and have observed that claims on 686 bonds have been filed by Anglo-Continentale Treuhand, A. G., whose address is in Paris; I intended my answer to cover Mr. Kiskaddon's inquiry as to the 610 bonds, and not to imply that other bonds were not embraced in the ownership of these bonds. I have had called to my attention the fact that the owners of these bonds claim \$686,000, whereas I have only \$16,000 for the entire foreign holding of July 1, 1935. I did file with me on the same date, by the Verwaltungsamt, A. G., with Paris office, claim on 262 bonds which in dollars would be \$262,000; and a total of those two would be

more than \$900,000. That is true. I account for the discrepancy by the difference in date, July 1, 1935, and the date of this filing. I don't know from my statement what beneficial foreign and domestic ownership there has been as of dates after July 1, 1935; for example, dates when proofs of claim were filed. That is true. I do not know other than of July 1, 1935.

As to whether my records would show the Pennsylvania Mutual Life Insurance Company was on July 1, 1935, the holder of a \$1,000 bond, they show said company held one bond on said date.

No further evidence was introduced.

**GUARANTY TRUST COMPANY
OF NEW YORK,**

As Trustee under First Terminal and
Unifying Mortgage dated January 1,
1912, Appellant.

By Davis, Polk, Wardwell, Gardiner
& Reed, Its Attorneys.

BERRYMAN HENWOOD,

Trustee of St. Louis Southwestern
Railway Company, Debtor,

By A. H. Kiskaddon &
Carleton S. Hadley, His Attorneys.

**ST. LOUIS SOUTHWESTERN
RAILWAY COMPANY,**

By A. H. Kiskaddon &
Carleton S. Hadley, Its Attorneys.

SOUTHERN PACIFIC COMPANY,

By George L. Buland,
Ben C. Dey, Its Attorneys.

Appellees.

(Approval of Stipulation as to Evidence by District Judge.)

This Stipulation as to the Evidence is approved this 14th
day of April, 1938.

CHARLES B. DAVIS,
District Judge.

Stipulation as to the Record on Appeal.

Filed April 15, 1938.

In the District Court of the United States, Eastern Division,
Eastern Judicial District of Missouri.

In the Matter of

St. Louis Southwestern Railway Company, Debtor.

In Proceedings for Reorganization of a Railroad.

No. 8497.

Guaranty Trust Company of New York, as Trustee,
Appellant,

vs.

Berryman Henwood, Trustee of St. Louis Southwestern Railway Company, Debtor, St. Louis Southwestern Railway Company, and Southern Pacific Company, Appellees.

It is hereby stipulated and agreed by and between Guaranty Trust Company of New York, as Trustee under St. Louis Southwestern Railway Company First Terminal and Unifying Mortgage dated January 1, 1912, Appellant, and Berryman Henwood, Trustee of St. Louis Southwestern Railway Company, Debtor, St. Louis Southwestern Railway Company, and Southern Pacific Company, Appellees, that the Clerk shall include in the Transcript of the Record to be filed in the United States Circuit Court of Appeals for the Eighth Circuit, in the appeal heretofore allowed on April 2, 1938, from the order dated March 21, 1938, entered in the above entitled cause, the following papers and no others:

1. Proof of claim of Guaranty Trust Company of New York, as Trustee as aforesaid, omitting Schedule "B" attached thereto.
2. Supplement to said proof of claim.
3. Protest against said proof of claim by Berryman Henwood, Trustee of St. Louis Southwestern Railway Company, Debtor.
4. Protest against said proof of claim by St. Louis Southwestern Railway Company.
5. Protest against said proof of claim by Southern Pacific Company.
6. Supplemental protest against said proof of claim by Berryman Henwood, Trustee of St. Louis Southwestern Railway Company, Debtor.

7. Supplemental protest against said proof of claim by St. Louis Southwestern Railway Company.
8. Supplemental protest against said proof of claim by Southern Pacific Company.
9. The order dated March 21, 1938, entered by said court on said proof of claim.
10. The Findings of Fact and Conclusions of Law of the court dated February 23, 1938.
11. The Stipulation as to the Evidence between the parties hereto.
12. The petition for appeal of Guaranty Trust Company of New York.
13. The assignment of errors.
14. The order dated April 2, 1938, allowing the appeal.
15. The Appeal Bond.
16. The citation and the acknowledgments of service thereof.
17. This stipulation.

It is further stipulated and agreed that Schedule "B" attached to said proof of claim, being a form of temporary bond, does not pertain to any of the bonds covered by said proof of claim and is immaterial to the issues involved in this appeal.

It is further stipulated and agreed that the documents referred to in this stipulation constitute the entire record insofar as the same is material to any of the issues involved in this appeal.

DAVIS, POLK, WARDWELL,
GARDINER & REED,

Attorneys for Guaranty Trust Company of New York, as Trustee under St. Louis Southwestern Railway Company First Terminal and Unifying Mortgage dated January 1, 1912, Appellant.

A. H. KISKADDON &
CARLETON S. HADLEY,

Attorneys for Berryman Henwood, Trustee of St. Louis Southwestern Railway Company, Debtor.

A. H. KISKADEN &
CARLETON S. HADLEY,
Attorneys for St. Louis Southwestern
Railway Company.

GEORGE L. BULAND,
BEN C. DEY,
Attorneys for Southern Pacific Com-
pany, Appellees.

The foregoing stipulation is approved this 14th day of
April, 1938.

CHARLES B. DAVIS,
District Judge.

(Clerk's Certificate to Transcript.)

United States of America,
Eastern Division of the

Eastern Judicial District of Missouri—ss.

I, Jas. J. O'Connor, Clerk of the District Court of the
United States within and for the Eastern Division of the
Eastern Judicial District of Missouri Do Hereby Certify the
above and foregoing to be a full, true and complete tran-
script (except insofar as the same is restricted by stipulation
as to record on appeal heretofore set out) of the record and
proceedings in case No. 8497 In the Matter of St. Louis South-
western Railway Company, Debtor, in Proceedings for Re-
organization of a Railroad, wherein Guaranty Trust Com-
pany of New York, as Trustee under St. Louis Southwestern
Railway Company First Terminal and Unifying Mortgage
dated January 1, 1912 is appellant and Berryman Henwood,
Trustee of St. Louis Southwestern Railway Company, Debtor,
St. Louis Southwestern Railway Company, and Southern
Pacific Company, are appellees, as fully as the same remains
on file and of record in my office and that the original citation
hereto attached and returned herewith.

In Testimony Whereof, I have hereto
subscribed my name and affixed the
seal of said Court at office in the
City of St. Louis, in said Division
of said District this 15th day of
April, in the year of our Lord Nine-
teen Hundred and Thirty-eight.

JAS. J. O'CONNOR,
Clerk of said Court.

By Cletus E. Rudolph,
Deputy.

(Seal)
S. Dist. Court
East. Div.
st. Jud. Dist.
of Mo.

(Waiver of Notice of Petition for Leave to Appeal, filed in U. S. Circuit Court of Appeals.)

In the United States Circuit Court of Appeals for the Eighth Circuit.

No. 11,172.

In the Matter of

St. Louis Southwestern Railway Company, Debtor.

Guaranty Trust Company of New York, as Trustee under St. Louis Southwestern Railway Company First Terminal and Unifying Mortgage dated January 1, 1912, Appellant,

vs.

Berryman Henwood, Trustee of St. Louis Southwestern Railway Company, Debtor, St. Louis Southwestern Railway Company, and Southern Pacific Company, Appellees.

In Proceedings for Reorganization of a Railroad.

The undersigned hereby acknowledge that they have been advised that Guaranty Trust Company of New York, as Trustee under St. Louis Southwestern Railway Company First Terminal and Unifying Mortgage dated January 1, 1912, proposes to file in the United States Circuit Court of Appeals for the Eighth Circuit, a petition for leave to appeal under Section 24 (b) of the Bankruptcy Act from an order of the United States District Court for the Eastern Division of the Eastern Judicial District of Missouri, entered in a proceeding then pending in said Court entitled "In the Matter of St. Louis Southwestern Railway Company, Debtor, In Proceedings for Reorganization of a Railroad, No. 8497," on March 21, 1938, allowing in part and disallowing in part the proof of claim and supplement thereto of said Guaranty Trust Company of New York, and that said Guaranty Trust of New York proposes to file with said petition an assignment of errors, and the undersigned do hereby waive notice of the presentation and hearing of said petition for leave to appeal, and consent that said petition be presented and heard before said Court without the necessity of notice to the undersigned, and without the necessity of serving upon the undersigned copies of said petition for leave to appeal and said assignment of errors to be filed therewith.

BERRYMAN HENWOOD,

Trustee of St. Louis Southwestern Railway Company, Debtor,

By A. H. Kiskaddon, Carleton S. Hadley,
His Attorneys.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY,

By A. H. Kiskaddon, Carleton S. Hadley,
Its Attorneys.

SOUTHERN PACIFIC COMPANY,

By Ben C. Dey, George L. Buland, Its
Attorneys.

(Endorsed): No. 11,172. Waiver of Notice as to Petition for Leave to Appeal under Section 24(b) of the Bankruptcy Act. Filed in U. S. Circuit Court of Appeals on April 2, 1938.

(Petition for Leave to Appeal under Section 24(b) of the Bankruptcy Act, filed in U. S. Circuit Court of Appeals.)

In the United States Circuit of Appeals for the
Eighth Circuit

No. 11,172

In the Matter of

St. Louis Southwestern Railway Company, Debtor.

Guaranty Trust Company of New York, as Trustee under St. Louis Southwestern Railway Company First Terminal and Unifying Mortgage dated January 1, 1912, Appellant,

vs.

Berryman Henwood, Trustee of St. Louis Southwestern Railway Company, Debtor, St. Louis Southwestern Railway Company, and Southern Pacific Company, Appellees.

In Proceedings for Reorganization of a Railroad.

To the Honorable Judges of the United States Circuit Court of Appeals for the Eighth Circuit:

Your petitioner, Guaranty Trust Company of New York, as Trustee under St. Louis Southwestern Railway Company First Terminal and Unifying Mortgage dated January 1, 1912, conceiving itself aggrieved by the order of the United States District Court for the Eastern Division of the Eastern Judicial District of Missouri, made by Honorable Charles B. Davis, one of the judges thereof, on March 21, 1938, in the proceeding then pending in said court entitled "In the Matter of St. Louis Southwestern Railway Company, Debtor, In Proceedings for Reorganization of a Railroad, No. 8497" allowing in part and disallowing in part the proof of claim and

the supplement thereto filed by your petitioner as such trustee, files this its petition addressed to the discretion of this Honorable Court for leave to appeal in matter of law from said order of the District Court.

Your petitioner refers to the Assignment of Errors filed by it simultaneously with this petition, setting forth the errors made by the Court below and giving the grounds for this appeal, and makes said Assignment of Errors a part hereof.

Your petitioner further states that St. Louis Southwestern Railway Company, the above-named debtor, on or about April 24, 1912, executed and delivered to your petitioner and Walker Hill, as trustees, a mortgage dated January 1, 1912, known as First Terminal and Unifying Mortgage of said debtor, securing the bonds issued, and to be issued, under the terms of said mortgage; that said trustees duly accepted said trust; that said Walker Hill died and Frank C. Rand, an individual citizen of the State of Missouri, was appointed and became successor trustee to the said Walker Hill; that under the terms of said mortgage the said Walker Hill and his successor Frank C. Rand had no duties to perform on behalf of the bondholders, but your petitioner was authorized to act alone on behalf of the bondholders, and was given powers usually and customarily given to corporate trustees under mortgages securing railroad bond issues; that certain bonds were issued pursuant to the provisions of said trust indenture, aggregating a total amount in terms of dollars of \$21,638,000, but for the reasons hereinafter stated the appellant in this appeal is acting on behalf of only 5,636 bonds of a principal amount in dollars of \$1,000 each.

Your petitioner further states that said debtor, St. Louis Southwestern Railway Company, on December 12, 1935, filed in said District Court a petition for reorganization under amendatory section 77 of the Bankruptcy Act, said proceeding being No. 8497, and said petition was thereafter approved as properly filed, and Berryman Henwood was duly appointed and qualified as trustee of the property of said debtor; that pursuant to orders in said debtor proceeding No. 8497, your petitioner filed its proof of claim as Trustee under said mortgage on behalf of all bonds issued under the terms of said mortgage, except such bonds the holders of which should file individual claims, and thereafter by leave of court a supplement to said proof of claim was duly filed; that protests and supplemental protests against your petitioner's proof of claim were filed by each of the appellees referred to in the caption to this petition; that pursuant to a stipulation entered into on November 8, 1937, between your petitioner and

the said appellees, it was agreed that the trial of the issues between your petitioner and the said appellees should exclude all issues relative to the claims of such bondholders who had filed separate proofs of claim in said proceeding, and by reason of such stipulation and filing of said separate proofs of claim, the trial upon your petitioner's proof of claim and this petition for appeal involve only 5,636 bonds issued under said mortgage, said bonds being coupon bonds hereinafter described.

Your petitioner further states that said debtor during the year 1912 issued and sold for a valuable consideration certain negotiable coupon bonds, including the aforesaid 5,636 bonds; that all of said bonds were duly authenticated as provided by said indenture and all of said 5,636 bonds are held by various persons other than the said debtor; that each of said coupon bonds is payable at the option of the holder either in the sum of \$1,000 in the City and State of New York or 2490 guilders in Amsterdam, Holland, or in other foreign currencies, and that each semiannual interest coupon is payable either in the sum of \$25 or 62.25 guilders or in other foreign currencies.

Your petitioner further states that said coupon bonds are on their face due and payable on January 1, 1932, subject to provisions in the mortgage that your petitioner might declare said bonds immediately due and payable upon the occurrence of certain events of default; that certain events of default occurred, including non-payment of the semiannual interest coupons due January 1, 1936; that on May 5, 1936, the said District Court entered an order enjoining your petitioner from declaring the principal of the bonds secured by said mortgage to be due and payable immediately; that your petitioner appealed from said order, which was subsequently reversed by a decree of this Court in causes Nos. 10,679 and 10,687 in Bankruptcy, and your petitioner was permitted by the decree of this Court to declare said bonds immediately due and payable either as of the date of said declaration or as of May 5, 1936, the date of said injunction order; that pursuant to the mandate from this Court, the said injunction was dissolved on February 24, 1937, and on February 25, 1937, your petitioner served notice upon the trustee of the debtor and upon the debtor declaring the principal of said bonds due and payable immediately on May 5, 1936.

Your petitioner further states that on September 24, 1936, it made demand for payment in guilders in Amsterdam, Holland, pursuant to the provisions of the law of Holland, and immediately thereafter filed its aforesaid proof of claim.

Your petitioner further states that in its proof of claim it confirmed its election to receive payment in terms of guilders, that prior to said demand and the filing of said proof of claim it published in various newspapers in the United States and in foreign countries a notice to the bondholders to the effect that it intended to elect to receive payment in guilders and to file a proof of claim on the guilder basis.

Your petitioner further states that it was stipulated between your petitioner and the said appellees that the exchange value of the guilder should be considered as \$.6778 on the following three dates: December 12, 1935, the date of the filing of the debtor petition; May 5, 1936, the date as of which said bonds were declared immediately due and payable; and September 24, 1936, the date on which your petitioner made demand as aforesaid in Amsterdam, Holland, and on which it made and executed its proof of claim; and it was further stipulated that the exchange value on the guilder on November 8, 1937, was \$.5560.

Your petitioner further states that the said protests and supplemental protests to your petitioner's proof of claim were directed solely against the guilder option and were based on the contentions that said guilder option was invalidated by the Joint Resolution of Congress approved June 5, 1935, 31 U. S. C. A. Sec. 463 (commonly referred to as the Gold Clause Resolution), or was invalidated by said Joint Resolution of Congress as to holders of said bonds who are citizens of the United States; that any such option was invalidated by failure to exercise the same prior to May 5, 1936; that your petitioner did not have the right to exercise an election on behalf of the holders of said bonds; that said option would constitute an illegal fictitious increase of indebtedness under the Constitution and Statutes of the State of Missouri; and that if said option is valid, the exchange value of the guilder should be determined as of the date on which judgment is entered.

Your petitioner further states that a hearing was had on the proof of claim of your petitioner and the aforesaid protests thereto; that on the 23rd day of February, 1938, the said District Court entered Findings of Fact and Conclusions of Law to the effect that the guilder option was invalidated by the aforesaid Joint Resolution of Congress, and that the claim should be allowed on the basis of the dollar principal amount of said bonds, and on the 21st day of March, 1938, the Court entered an order allowing said proof of claim as to said 5,636 bonds on the basis of allowance of \$1,000 principal amount, plus interest on said sum at the rate of

Five Per Cent Per Annum from July 1, 1935, to December 12, 1935, and disallowing your petitioner's proof of claim as to any additional amount; that a copy of said Findings of Fact and Conclusions of Law and a copy of said order are hereto attached and reference is hereby made thereto; that the said order of the District Court and its Findings of Fact and Conclusions of Law are erroneous in the particulars set forth in the Assignment of Errors filed herewith.

Your petitioner further states that most of the facts were stipulated between your petitioner and the said appellees; that no substantial question of fact is involved; that the decision of said District Court is in conflict with the case of Anglo-Continentale Treuhand, A. G. vs. St. Louis Southwestern Railway Company, 81 Federal (2) 11, decided by the United States Circuit Court of Appeals for the Second Circuit, in which a petition for certiorari was denied by the Supreme Court of the United States, which involved coupons on coupon bonds issued under the same mortgage as the coupon bonds involved in the proof of claim of your appellant, and the said findings, conclusions, and order of the said District Court were based on a certain decision of the United States Supreme Court, referred to in the Findings of Fact and Conclusions of Law hereto annexed, which decision did not construe a right or option to receive payment in foreign currency.

Wherefore, Your Petitioner Prays, That it be allowed in the discretion of this Honorable Court to appeal in the matter of law herein; that the prayer of this petition be granted, and a citation be issued to Berryman Henwood, Trustee of St. Louis Southwestern Railway Company, Debtor, St. Louis Southwestern Railway Company and Southern Pacific Company commanding them to appear before the United States Circuit Court of Appeals for the Eighth Circuit, to do and receive what may appertain to justice to be done in the premises; and that a Transcript of the Record in said proceedings, duly authenticated, may be transmitted to the United States Circuit Court of Appeals for the Eighth Circuit.

Dated Apr. 2, 1938.

GUARANTY TRUST COMPANY OF
NEW YORK, as Trustee under St.
Louis Southwestern Railway Company
First Terminal and Unifying Mortgage
dated January 1, 1912, Petitioner.

By Davis, Polk, Wardwell, Gardiner &
Reed; Thompson, Mitchell, Thompson
& Young, Its Attorneys.

(Findings of Fact and Conclusions of Law of District Court on issues presented by Claim of Guaranty Trust Company of New York, as Trustee, etc.)

(Filed February 23, 1938.)

Memorandum of Clerk of U. S. Circuit Court of Appeals:

The Findings of Fact and Conclusions of Law of the District Court on issues presented by Claim of Guaranty Trust Company of New York, as Trustee, etc., was attached to the foregoing Petition for Appeal, but is omitted at this place in the printed record in order to avoid duplication for the reason that a copy of such Findings of Fact and Conclusions of Law, etc., heretofore appear in this printed record.

(Order of United States District Court allowing Claim of Guaranty Trust Company of New York as Trustee, etc., in Certain Amount, etc.)

(Filed March 21, 1938.)

Memorandum of Clerk of U. S. Circuit Court of Appeals:

The Order of the United States District Court allowing the Claim of Guaranty Trust Company of New York, as Trustee, etc., in Certain Amount, etc., was attached to the foregoing Petition for Appeal, but is omitted at this place in the printed record in order to avoid duplication for the reason that a copy of such Order heretofore appears in this printed record.

(Endorsed): No. 11,172. Petition for leave to Appeal under Section 24(b) of the Bankruptcy Act. Filed in U. S. Circuit Court of Appeals on April 2, 1938.

(Assignment of Errors on Appeal allowed by U. S. Circuit Court of Appeals.)

Comes now Guaranty Trust Company of New York as Trustee under St. Louis Southwestern Railway Company First Terminal and Unifying Mortgage dated January 1, 1912, and files the following assignment of errors upon which it will rely in the prosecution of the appeal herewith petitioned for in the above entitled cause from the order of the District Court entered on the 21st day of March, 1938.

1. The Court erred in entering its order dated March 21, 1938, in allowing only \$1,000.00, plus interest, for each of

the Debtor's First Terminal and Unifying Mortgage Bonds (hereinafter termed the "Bonds") allowed under said claim.

2. The Court erred in entering its order dated March 21, 1938, in failing to allow the sum of \$1,687.72, principal amount, plus \$37.739, being interest on said principal amount, at the rate of 5% per annum from July 1, 1935, to December 12, 1935, being the total amount of \$1,725.46 on each of the Bonds allowed under said claim.

3. The Court erred in entering its order dated March 21, 1938, in restricting the allowance on the Bonds allowed under said claim to the stated dollar amount of said Bonds, plus interest, instead of allowing an amount equal to the guilder exchange value of 67.78 cents on 2490 guilders principal amount of each Bond, plus interest on said amount at the rate of 5% per annum from July 1, 1935, to December 12, 1935.

4. The Court erred in entering its order dated March 21, 1938, in restricting the allowance on the Bonds allowed under said claim to the stated dollar amount of said Bonds, plus interest, instead of allowing an amount equal to the proper guilder exchange value on 2490 guilders principal amount of each Bond, plus interest on said amount at the rate of 5% per annum from July 1, 1935, to December 12, 1935.

5. The Court erred in entering its order dated March 21, 1938, in allowing said claim only on the basis of the dollar face value of said Bonds and making no allowance on account of the option conferred by said Bonds to receive payment in guilders.

6. The Court erred in that part of its Finding of Fact number 8 reading as follows:

"The Railway Company's said First Terminal and Unifying Bonds were issued to evidence the Debtor's liability for the repayment of sums of United States money borrowed."

7. The Court erred in failing to find that the foreign currency clauses of the Debtor's Bonds constituted an optional medium of payment offered by the Debtor at the time of the original issue of said Bonds for the purpose and with the effect of inducing purchasers thereof to purchase the same.

8. The Court erred in failing to find that the foreign currency clauses in the Debtor's Bonds were part of the consideration moving from the Debtor for the price paid therefor by purchasers thereof.

9. The Court erred in failing to find that at the time of issuance of the Debtor's Bonds, the Debtor understood, contemplated and agreed that the duty and expense of obtaining foreign exchange, including guilder exchange, would be assumed and discharged by the Debtor upon any valid election by or on behalf of any holders of said Bonds to receive any foreign currency permitted by said option.

10. The Court erred in failing to find that upon and in connection with the execution and delivery of the Debtor's First Terminal and Unifying Mortgage and upon and in connection with the issuance and purchase of the Debtor's Bonds thereunder, the Debtor intended and agreed with or for the benefit of purchasers and holders of said Bonds that the foreign currency options stated in said Bonds, whether in guilders, marks, pounds or French francs, were and were to be equal and interchangeable alternatives of the same rank with the promise therein to pay dollars.

11. The Court erred in failing to find that upon and in connection with the execution and delivery of the Debtor's First Terminal and Unifying Mortgage and upon and in connection with the issuance and purchase of the Debtor's Bonds thereunder, the Debtor intended and agreed with or for the benefit of purchasers and holders of said Bonds that the Debtor would, upon any valid election of the money of payment, pay the designated amounts in the respective currencies, whether in dollars, guilders, marks, pounds or French francs, as alternative promises of co-ordinate and equal rank in all respects.

12. The Court erred in failing to find that the Debtor's promise in its Bonds to pay United States dollars was and was intended to be a promise performable only on the valid exercise of the option contained in said Bonds and said Mortgage.

13. The Court erred in failing to find that at the time of issuance of the Bonds the Debtor intended and agreed with or for the benefit of purchasers or holders of said Bonds that at the maturity or upon any acceleration thereof the option of the medium of payment as among dollars, guilders, marks, pounds or francs should be exercised by, or on behalf of, the holders of said Bonds.

14. The Court erred in that part of its Finding of Fact number 8 reading as follows:

"* * * the amount of guilders mentioned in the bonds was at the time of the issuance of said bonds the equivalent of \$1,000 United States gold coin of the standard of weight

and fineness as it existed on January 1, 1912, and it was understood, and specified in the indenture under which said bonds were issued, that the amounts of guilders, pounds, francs or marks mentioned in said bonds were each "the equivalent of United States gold coin in said amount and of such standard of weight and fineness."

15. The Court erred in failing to find as part of its Finding of Fact number 8 in lieu of the part thereof above quoted in the Assignment of Error numbered 14:

"* * * the amount of guilders mentioned in the bonds was at the time of the issuance of said bonds the equivalent of \$1,000 United States gold coin of the standard of weight and fineness as it existed on January 1, 1912, and it was understood and specified in the Indenture under which said bonds were issued, that the amounts of guilders, pounds, francs or marks mentioned in said bonds were each the equivalent of United States gold coin in said amount and of such standard of weight and fineness at the time of issuance in 1912, but not necessarily at any other time or at any time after the time of issuance in 1912."

16. The Court erred in failing to find that at the time of issuance of the Debtor's Bonds the Debtor understood and realized that after issuance thereof the foreign currencies mentioned in said Bonds might fluctuate on the exchange market by comparison with United States dollars.

17. The Court erred in failing to find that the Claimant's election to receive, and demand for, payment in guilders of the amount embraced within its proof of claim, was duly made on September 24, 1936.

18. The Court erred in its Conclusion of Law No. 1 in holding that the Joint Resolution of Congress of June 5, 1933 (hereinafter called the "Joint Resolution") reaches and applies to every obligation payable in money of the United States, incurred before or after June 5, 1933, whether or not there is contained therein or made with respect thereto any provision which purports to give the obligee a right to require payment in gold or a particular kind of coin or currency of the United States, or in an amount in money of the United States measured thereby.

19. The Court erred in its Conclusion of Law No. 1 in holding that every obligation payable in money of the United States must be discharged upon payment, dollar for dollar, in any coin or currency of the United States which at the time of payment is legal tender for public and private debts.

20. The Court erred in failing to hold that the Joint Resolution of Congress of June 5, 1933, does not reach and apply to obligations which may be paid in money of the United States but may also be paid in some foreign currency if such foreign currency is validly elected as the medium of payment.

21. The Court erred in its Conclusion of Law No. 2 in holding that the word "obligation" in the Joint Resolution refers to a bond or coupon of a character therein defined, as a whole, rather than to particular "provisions" contained therein.

22. The Court erred in its Conclusion of Law No. 2 in holding that the Supreme Court of the United States in *Norman v. Baltimore & Ohio R. R.*, 294 U. S. 240, 79 L. Ed. 885, and *Perry v. United States*, 294 U. S. 330, 79 L. Ed. 912, construed the word "obligation" as referring to a bond or coupon of the character defined in the Joint Resolution, as a whole, rather than particular "provisions" contained therein.

23. The Court erred in its Conclusion of Law No. 3 in holding that the word "payable" as used in the Joint Resolution, and as applied to the Debtor's Bonds means "capable of being paid".

24. The Court erred in failing to hold that the word "payable" as used in the Joint Resolution, and as applied to the Debtor's Bonds, refers to obligatory payment rather than permissive payment.

25. The Court erred in its Conclusion of Law No. 3 in holding that the Bonds of St. Louis Southwestern Railway Company issued under and pursuant to the Railway Company's First Terminal and Unifying Mortgage are required to be paid in United States dollars, reserving an option to the holders of the Bonds to elect to receive payment in guilders, francs, marks or pounds.

26. The Court erred in its Conclusion of Law No. 3 in holding that even if the aforesaid promises to pay guilders, francs, marks, or pounds, be considered as alternative to, and of equal rank with, the aforesaid promise to pay dollars, the Bonds are capable of being paid and the Debtor may be compelled to pay in money of the United States, and therefore they are "payable in money of the United States" within the meaning of the Joint Resolution.

27. The Court erred in failing to hold that the Bonds are not primarily dollar obligations, and that the promises con-

tained therein to pay guilders, francs, marks or pounds, are alternative to, and of an exactly equal rank with the promise contained therein to pay dollars.

28. The Court erred in its Conclusion of Law No. 4 in holding that the Joint Resolution deals with obligations payable in a specified amount of money of the United States which also contain provisions attempting to confer additional rights upon obligees and that the application of the Joint Resolution is not limited to obligations which can be paid only in money of the United States.

29. The Court erred in its Conclusion of Law No. 4 in holding that any contract which gives the obligee an unqualified right to receive money of the United States, even though such right requires the exercise of an option, is within the scope of the Joint Resolution.

30. The Court erred in failing to hold that any contract which gives the obligee the right to receive the money of the United States contingent on the exercise of an option which also affords the obligee the alternative right to receive money of a foreign nation, is not within the scope of the Joint Resolution.

31. The Court erred in failing to hold that the right to elect the currency which should be the medium of payment for the Bonds belonged to the Bondholders or to the Claimant acting on their behalf, and at no time passed to the Debtor.

32. The Court erred in its Conclusion of Law No. 5 in holding that the Bonds on which the said claim was filed were obligations payable in money of the United States on June 5, 1933, and therefore the Joint Resolution reaches and applies to said Bonds.

33. The Court erred in its Conclusion of Law No. 6 in holding that the option contained in the Bonds became inoperative on June 5, 1933, which was the effective date of the Joint Resolution, and that the purported election (whether or not the Claimant, as Trustee, had the power to make an election) on a date subsequent to June 5, 1933, was and is wholly ineffective and without any force or effect.

34. The Court erred in its Conclusion of Law No. 6 in holding that said Bonds were on June 5, 1933, payable in money of the United States and the said Joint Resolution on that date directed that all obligations then so payable should be discharged upon payment, dollar for dollar, in any coin

or currency which at the time of payment is legal tender for public and private debts.

35. The Court erred in failing to find that the election by Guaranty Trust Company as Trustee to receive payment in guilders was not contrary to the public policy of the United States as expressed in the Joint Resolution.

36. The Court erred in its Conclusion of Law No. 7 in holding that bonds of the character defined in the Joint Resolution must be discharged upon payment, dollar for dollar, in any coin or currency of the United States which at the time of payment is legal tender for public or private debts, and the Debtor being in bankruptcy under amendatory Section 77 of the Bankruptcy Act and therefore being incapable of discharging said Bonds by payment of any kind, a claim on said Bonds must be allowed, dollar for dollar, in any coin or currency of the United States which at the time of allowance is legal tender for public and private debts.

37. The Court erred in failing to hold that the Joint Resolution of Congress of June 5, 1933, declares to be against public policy only provisions in an obligation which purport to give the obligee a right to require payment in gold or a particular kind of coin or currency of the United States or an amount in money of the United States measured thereby.

38. The Court erred in failing to hold that a provision which purports to give the obligee a right to require payment in units of a specified foreign currency not money of the United States is valid and enforceable, even though contained in an obligation also containing provisions which purport to give the obligee an alternative right to require payment in money of the United States measured by gold.

39. The Court erred in holding in its Conclusion of Law No. 8 that the rule of public policy announced in the Joint Resolution is applicable to the Bonds herein.

40. The Court erred in its Conclusion of Law No. 9 in holding that under the authority of the Supreme Court of the United States in *Holyoke Water Power Company v. American Writing Paper Company*, 300 U. S. 324, 81 L. Ed. 383, the alternative forms of payment in the Bonds here involved require the payment of money and not the delivery of a commodity.

41. The Court erred in its Conclusion of Law No. 9 in holding that what was intended by the issuance of the Bonds was to assure the payment of a money debt in United States

dollars of a value as constant as that of gold or other currencies.

42. The Court erred in its Conclusion of Law No. 9 in holding that the words used in the Bonds show that the end in view was a repayment of United States money loaned and not a sale of guilders or any other currency or commodity.

43. The Court erred in its Conclusion of Law No. 9 in holding that the Bonds are within the letter of the Joint Resolution and equally within its spirit.

44. The Court erred in failing to hold that the guilder option contained in the Bonds, when validly exercised, became a straight contract to pay guilders.

45. The Court erred in failing to hold that the promise to pay guilders in Amsterdam, contained in the Bonds, is, in the eyes of the Court, a promise to deliver an ordinary commodity.

46. The Court erred in failing to hold that the Debtor's contract to pay guilders in Amsterdam, as set forth in its Bonds, was and is either a contract to deliver a commodity, or a contract to pay foreign money in a foreign country, and that such contract in either case is outside the scope of the Joint Resolution.

47. The Court erred in its Conclusion of Law No. 10 in holding that the number of guilders mentioned in each bond was specified as the equivalent of United States gold coin of the standard of weight and fineness existing on January 1, 1912; and that under the authority of the decision of the United States Supreme Court in *Holyoke Water Power Company v. American Writing Paper Company*, 300 U. S. 324, a contract for the payment of gold as the equivalent of money, and a fortiori, a contract for the payment of money measurable in gold, is within the letter of the Joint Resolution and equally within its spirit.

48. The Court erred in its Conclusion of Law No. 11 in holding that the decision of the United States Supreme Court in *Holyoke Water Company v. American Writing Paper Company*, 300 U. S. 324, 81 L. Ed. 383, places an interpretation upon the Joint Resolution inconsistent with the interpretation placed thereon by the United States Circuit Court of Appeals for the Second Circuit in *Anglo-Continentale Treuhand, A. G. v. St. Louis Southwestern Railway Company*, 81 F. (2d) 11, cert. denied 80 L. Ed. 1381.

49. The Court erred in failing to follow the decision of the United States Circuit Court of Appeals for the Second

Circuit in Anglo-Continentale Treuhand, A. G. v. St. Louis Southwestern Railway Company, 81 F. (2d) 11, cert. denied 80 L. Ed. 1381.

50. The Court erred in holding in its Conclusion of Law No. 12 that it was bound in this case to follow the decision of the United States Supreme Court in Holyoke Water Power Company v. American Writing Paper Company, 300 U. S. 324.

51. The Court erred in its Conclusion of Law No. 12 in holding that the decision of the United States Supreme Court in Holyoke Water Power Company v. American Writing Paper Company, 300 U. S. 324, 81 L. Ed. 383, supports the conclusions reached by the Court herein.

52. The Court erred in failing to hold that the Joint Resolution does not apply to contracts to pay guilders in Holland.

Wherefore, your petitioner prays that the said order may be reversed and the proof of claim of your petitioner be allowed in full, and for such other and further relief as to the Court may seem just and proper.

Dated Apr. 2, 1938.

GUARANTY TRUST COMPANY OF
NEW YORK, as Trustee under St.
Louis Southwestern Railway Company
First Terminal and Unifying Mortgage,
dated January 1, 1912, Petitioner,

By Davis, Polk, Wardwell, Gardiner &
Reed, Thompson, Mitchell, Thompson
& Young, Its Attorneys.

(Endorsed): No. 11,172. Assignment of Errors. Filed
in U. S. Circuit Court of Appeals on April 2, 1938.

(Order of U. S. Circuit Court of Appeals Allowing Appeal
and Consolidating Appeals Allowed by the District
Court and by the U. S. Circuit Court of Appeals, etc.)

In the United States Circuit Court of Appeals for the
Eighth Circuit.

March Term, 1938.

Monday, April 4, 1938.

In the Matter of

St. Louis Southwestern Railway Company, Debtor.

In Proceedings for Reorganization of a Railroad.

Guaranty Trust Company of New York, as Trustee under St. Louis Southwestern Railway Company First Terminal and Unifying Mortgage dated January 1, 1912, Appellant,

No. 11,172. vs.

Berryman Henwood, Trustee of St. Louis Southwestern Railway Company, Debtor, St. Louis Southwestern Railway Company, and Southern Pacific Company, Appellees.

The Petition of Guaranty Trust Company of New York, as Trustee under St. Louis Southwestern Railway Company First Terminal and Unifying Mortgage dated January 1, 1912, for leave to appeal under Section 24 (b) of the Bankruptcy Act from the order of the United States District Court of the Eastern Division of the Eastern Judicial District of Missouri, made by the Honorable Charles B. Davis, one of the judges thereof, on the 21st day of March, 1938, in a proceeding then pending in said court, entitled, "in the Matter of St. Louis Southwestern Railway Company, Debtor, In Proceedings for Reorganization of a Railroad, No. 8497" allowing in part and disallowing in part the proof of claim and supplement thereto of said petitioner having been presented in open court, and good and sufficient reasons having been presented to the Court why said appeal should be allowed;

It Is Hereby Ordered, That said petition for leave to appeal from the said order is hereby granted and an appeal to this Court is hereby allowed.

It Is Further Ordered, That the bond on appeal be fixed in the sum of Five Hundred Dollars (\$500.00).

The Court having been advised that the said District Court, through the Honorable Charles B. Davis, has heretofore entered an order allowing an appeal to this Court from the aforesaid order of March 21, 1938, in said District Court;

It Is Further Ordered, That the two appeals be consolidated in this Court and that the Transcript of the Record filed in this Court in connection with said appeal allowed in said District Court shall be considered as the Transcript of record for the purpose of this appeal, and that no additional transcript of the record shall be required.

By order of the Court April 4th, 1938.

(Bond on Appeal Allowed by U. S. Circuit Court of Appeals)

Know All Men By These Presents, That we, Guaranty Trust Company of New York, a corporation, as principal and United States Fidelity and Guaranty Company, a corporation, as surety, are held and firmly bound unto Berryman Henwood, Trustee of St. Louis Southwestern Railway Company, Debtor, St. Louis Southwestern Railway Company and Southern Pacific Company in the sum of Five Hundred Dollars (\$500.00) to be paid to the said Obligees to which payment well and truly to be made we bind ourselves and our successors, jointly and severally, by these presents.

The condition of this obligation is that:

Whereas, Guaranty Trust Company of New York, as Trustee under St. Louis Southwestern Railway Company First Terminal and Unifying Mortgage dated January 1, 1912, has filed its petition for leave to appeal under Section 24(b) of the Bankruptcy Act to the United States Circuit Court of Appeals for the Eighth Circuit from the order entered by the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri in the proceeding pending in said court entitled "In the Matter of St. Louis Southwestern Railway Company, Debtor, In Proceedings for Reorganization of a Railroad, No. 8497," on March 21, 1938, allowing in part and disallowing in part the proof of claim and the supplement thereto of said Guaranty Trust Company of New York, as such trustee; and //

Whereas, said petition for leave to appeal has been allowed by said United States Circuit Court of Appeals;

Now, Therefore, if said Guaranty Trust Company of New York, the said appellant, shall prosecute its appeal to effect, and if it shall fail to make its appeal good, shall answer all costs, then this obligation shall be void, otherwise to remain in full force and effect.

Dated March 28, 1938.

GUARANTY TRUST COMPANY
OF NEW YORK,
By Kingsley Kunhardt,
Vice-President, Principal.

Attest:

W. W. Merker,
Assistant Secretary.

(Seal)

UNITED STATES FIDELITY
AND GUARANTY COMPANY,

By S. Frank Hedges,

(Seal)

Attorney-in-Fact,
Surety.

Attest:

C. B. Bradbury,
Attorney-in-fact.

Countersigned:

Joseph A. Sutz,
Resident Missouri Agent.

Affidavit, Acknowledgement and Justification

By the United States Fidelity and Guaranty Company

State of New York,

County of New York—ss.:

Before me personally came S. Frank Hedges known to me to be Attorney-in-fact of the United States Fidelity and Guaranty Company, the corporation described in and which executed the annexed bond of Guaranty Trust Company of New York as surety thereon, who being by me duly sworn, deposes and says that he resides in the City of New York, State of New York, and that he is the Attorney-in-fact of the said United States Fidelity and Guaranty Company, and knows the corporate seal thereof; that said Company is duly and legally incorporated under the laws of the State of Maryland; that said Company has complied with the provisions of the Act of Congress of August 13, 1894, allowing certain corporations to be accepted as surety on bonds; that the seal affixed to the annexed bond of Guaranty Trust Company of New York is the corporate seal of the said United States Fidelity and Guaranty Company, and was thereto affixed by order and authority of the Board of Directors of said Company; and that he signed his name thereto by like authority as Attorney-in-fact of said Company and that he is acquainted with C. B. Bradbury and knows him to be Attorney-in-fact of said Company; and that the signature of said C. B. Bradbury subscribed to said bond is the genuine handwriting of said C. B. Bradbury and was thereto subscribed by order and authority of said Board of Directors, and in the presence of said deponent; and that the assets of said Com-

pany, unencumbered and liable to execution, exceed its claims, debts and liabilities, of every nature whatsoever, by more than the sum of two million dollars (\$2,000,000.00).

S. FRANK HEDGES.

(Seal)

Sworn to, acknowledged before me, and subscribed in my presence this 28th day of March, 1938.

FRANCES H. HALLY,

Notary Public, Kings County Clerk's No. 409,
Register's No. 9102

Certificate filed in the following counties: New York Clerk's No. 511, Register's No. 9H359, Bronx Clerk's No. 43, Register's No. 138H39, Queens Clerk's No. 1304, Register's No. 5376, Richmond County Clerk and Register Westchester County Clerk and Register. Term Expires March 30, 1939.

The within Appeal Bond is hereby approved both as to form and the sufficiency of the surety thereon, this 4th day of April, 1938.

KIMBROUGH STONE,

Presiding Judge of the United
States Circuit Court of Appeals
for the Eighth Circuit.

(Endorsed): No. 11,172. Appeal Bond. Filed in U. S. Circuit Court of Appeals on April 4, 1938.

(Citation on Appeal Allowed By U. S. Circuit Court of Appeals and Service.)

In the United States Circuit Court of Appeals,
For the Eighth Circuit

In Proceedings for Reorganization of a Railroad.

In the Matter of

St. Louis Southwestern Railway Company, Debtor.

Guaranty Trust Company of New York, as Trustee under St. Louis Southwestern Railway Company First Terminal and Unifying Mortgage dated January 1, 1912, Appellant.

vs.

Berryman Henwood, Trustee of St. Louis Southwestern Railway Company, Debtor, St. Louis Southwestern Railway Company, and Southern Pacific Company, Appellees.

United States of America,

BERRYMAN HENWOOD, Trustee of St. Louis Southwestern Railway Company, Debtor, St. Louis Southwestern Railway Company, and Southern Pacific Company:

on and each of you are hereby cited and admonished to be appear in the United States Circuit Court of Appeals for Eighth Circuit at St. Louis, Missouri, forty days from and the day this citation bears date, pursuant to a petition leave to appeal under Section 24(b) of the Bankruptcy filed in the United States Circuit Court of Appeals for Eighth Circuit, and the order of said United States Circuit Court of Appeals allowing said appeal, wherein Guaranty Trust Company of New York, as Trustee under St. Louis Southwestern Railway Company First Terminal and Unifying Mortgage dated January 1, 1912, is the appellant, and are the appellees, to show cause, if any there be, why the order entered against said appellant, as in said petition for leave to appeal mentioned, should not be corrected and why any delay in justice should not be done the parties in that behalf.

dated this 4th day of April, 1938.

KIMBROUGH STONE

Presiding Judge.

Service acknowledged.

A. H. KISKADDON

CARLETON S. HADLEY,

Attorneys for Berryman Henwood,
Trustee of St. Louis Southwestern Railway Company, Debtor.

A. H. KISKADDON

CARLETON S. HADLEY

Attorneys for St. Louis Southwestern Railway Company.

GEORGE L. BULAND

BEN C. DEY

Attorneys for Southern Pacific Company.

(advised): No. 11,172. Citation on Appeal allowed by Circuit Court of Appeals. Filed in U. S. Circuit Court of Appeals on April 14, 1938.

**Joint Motion of Appellant and Appellees for Leave to File
Printed Copies of Mortgage in Lieu of Including
and Reprinting a Transcript of Record.**

Come now appellant and appellees and state that on April 2, 1938, the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, granted an appeal to the appellant from an order entered in said Court on March 21, 1938, in a cause entitled "In the Matter of St. Louis Southwestern Railway Company, Debtor, In Proceedings for Reorganization of a Railroad, No. 8497" and said appellant will also file, or has filed, a petition in the United States Circuit Court of Appeals for leave to appeal under Section 24(b) of the Bankruptcy Act and will request, in which request appellees join, that if said petition for leave to appeal be granted, that the two appeals be consolidated in this Court and that the Transcript of the Record filed in this Court in connection with said appeal allowed in said District Court shall be considered as a Transcript of the Record for the purpose of this appeal and that no additional Transcript of the Record shall be required; that one of the documents for the record on appeal is the First Terminal and Unifying Mortgage, dated January 1, 1912, from St. Louis Southwestern Railway Company to Guaranty Trust Company of New York and Walker Hill, Trustees; that said mortgage consists of more than 100 printed pages, and the trustee of the Debtor has delivered to appellant 20 printed copies of said mortgage, and both appellant and appellees desire to avoid unnecessary costs which would be occasioned by having said mortgage reprinted as part of the Transcript of Record; and that there are also on file in this Court several copies of said mortgage filed in connection with consolidated appeals Nos. 10,679 and 10,687 in bankruptcy in this Court;

Wherefore, appellant and appellees pray that this Court enter an order authorizing 20 printed copies of said mortgage to be filed in this Court, to be considered together with the remaining copies on file in said consolidated appeals Nos. 10,679 and 10,687 as part of the Transcript of Record in the aforesaid appeal taken from said District Court and in the appeal in this Court, if the said petition for leave to appeal should be granted, without the necessity of said mortgage being included in the Transcript of Record filed in this Court or in the printed Transcript of Record.

DAVIS, POLK, WARDWELL,
GARDINER & REED, THOMPSON,
MITCHELL, THOMPSON & YOUNG,
Attorneys for Plaintiff.

A. H. KISKADDON, CARLETON S.
HADLEY,

Attorneys for Berryman Henwood,
Trustee of St. Louis Southwestern
Railway Company, Debtor.

A. H. KISKADDON, CARLETON S.
HADLEY,

Attorneys for St. Louis Southwest-
ern Railway Company.

BEN C. DEY, GEORGE L. BULAND.
Attorneys for Southern Pacific Com-
pany.

(Endorsed): No. 11,172. Joint Motion of Appellant and
appellees for leave to file printed copies of Mortgage in lieu
including and reprinting a transcript of record. Filed in
S. Circuit Court of Appeals on April 4, 1938.

(Order of U. S. Circuit Court of Appeals denying Motion
Parties for leave to file printed copies of certain Mort-
gage in lieu of printing same in record.)

United States Circuit Court of Appeals, Eighth Circuit.

March Term, 1938.

Monday, April 4, 1938.

the Matter of

St. Louis Southwestern Railway Company, Debtor.

Granty Trust Company of New York, as Trustee under
St. Louis Southwestern Railway Company First Ter-
minal and Unifying Mortgage dated January 1, 1912,
Appellant.

No. 11,172 vs.

Berryman Henwood, Trustee of St. Louis Southwestern
Railway Company, Debtor, St. Louis Southwestern
Railway Company, and Southern Pacific Company, Ap-
pellees.

Appeal from the District Court of the United States for the
Eastern District of Missouri.

In this matter comes before the Court on the joint motion
of appellant and appellees for leave to file printed copies
of mortgage in lieu of including and reprinting thereof in
transcript of record, and it appearing to the Court that

in either these appeals or other appeals allowed this day to the Chemical Bank and Trust Company that the entire mortgage will have to be printed in the record, said motion is denied without objection from the parties represented before the Court.

April 4, 1938.

(Notice by Appellant of Motion for Special Setting of cases.)

To: Berryman Henwood, Trustee of St. Louis Southwestern Railway Company, Debtor; St. Louis Southwestern Railway Company; and Southern Pacific Company, Appellees:

You are hereby notified that on Monday, April 4, 1938, at 10 a. m., the above-entitled appellant will present for hearing before the United States Circuit Court of Appeals at 1608 Federal Reserve Bank Building, Kansas City, Missouri, its motion that the appeal allowed in the United States District Court for the Eastern Division of the Eastern District of Missouri from the order entered in said Court on March 21, 1938, in the proceeding entitled In the Matter of St. Louis Southwestern Railway Company, Debtor, In Proceedings for Reorganization of a Railroad, No. 8497, and also the appeal allowed by the United States Circuit Court of Appeals for the Eighth Circuit on the petition of the appellant for leave to appeal if said petition shall be allowed, be set for hearing during the week commencing Monday, May 9, 1938, or as soon thereafter as said appeal or appeals can be heard, and for such special order with reference to the time for filing briefs as the Court may enter upon said motion.

Dated, March 31, 1938.

Yours, etc.,

THOMPSON MITCHELL THOMPSON & YOUNG,

Office and Post Office Address:
705 Olive Street,
St. Louis, Missouri.

**DAVIS POLK WARDWELL
GARDINER & REED,**

Office and Post Office Address:
15 Broad Street,
Borough of Manhattan,
New York, N. Y.

Attorneys for Guaranty Trust Company
of New York, as Trustee under St. Louis
Southwestern Railway Company First
Terminal and Unifying Mortgage dated
January 1, 1912.

Copy received March 31, 1938.

**BEN C. DEY and GEORGE L. BU-
LAND,**

Attorneys for Appellee, Southern Pacific
Co.

(Endorsed): No. 11,172. Notice of Hearing of Motion of
Appellant for Special Setting. Filed in U. S. Circuit Court
of Appeals on April 4, 1938.

Statement by Appellee Southern Pacific Company in Opposi-
tion to Motion to Suspend Rules and for Special Set-
ting of This Appeal.

The appellee, Southern Pacific Company, respectfully op-
poses the setting of this case for hearing at the Term of this
Court to be held at St. Paul, Minnesota, beginning on the
first Monday of May, 1938, upon the following grounds:

1. Such setting is entirely out of the regular course and
will require departure from Section 3 of the Rules of this Cir-
cuit providing that cases will be heard at the May Term in
St. Paul if, and only if, transcripts therein are filed on or
before the first day of March, and will also require the short-
ening of the time allowed by Rule 14 for the filing of briefs
of appellees. The transcript herein could not be filed until
some time in April, and as the appellant cannot file its brief
until some time thereafter, the time allowed for appellee's
brief or briefs will be substantially less than the thirty-five
days, after receipt of appellant's brief, contemplated by the
rules.

To so shorten the time for preparation of the case by
appellees does not permit adequate time for preparation
of briefs. Such shortening of the time for briefs is particu-

larly inappropriate in this case. The case is one of extreme importance, involving several millions of dollars, and six principal points of protest have been raised. The point of protest upon which the case was decided in favor of the appellees in the Court below concerns the interpretation and application of the Joint Resolution of Congress of June 5, 1933, 31 U. S. C. A., Section 463, upon which there have been varying judicial and editorial views. It is quite true that the case was diligently prepared in the Court below and that extensive briefs were filed therein. It is not true that the review and condensation for this Court of the material before the District Court and the further study desirable to fully enlighten this Court in respect to the issues are simple matters which can be done casually or in a limited time. The shortening of time for briefs places a hardship on counsel for appellees, not shared to the same extent by counsel for appellant. Appellant in this case is represented by Messrs. Davis Polk Wardwell Gardiner & Reed of New York City, by Messrs. Thompson, Mitchell, Thompson & Young of St. Louis, Missouri, and by Mr. Henry S. Caulfield of St. Louis, Missouri, and by the particular partners and associates of those firms handling the case. Signatures upon the brief filed in the District Court for appellant indicated that the brief filed was the joint work of seven lawyers, and in the preparation of the brief the firm of Davis Polk Wardwell Gardiner & Reed can call upon a staff of from fifty to one hundred lawyers. On the other hand, the appellees Henwood and St. Louis Southwestern Railway Company are represented by Messrs. Kiskaddon and Hadley, who with a small staff are charged with the law work for that Railway Company and its Trustee, and the Southern Pacific Company is represented by the affiant George L. Buland and by Mr. Ben C. Dey, the General Counsel of that Railroad, whose time must necessarily be occupied largely with other matters. The railroads are now faced with many pressing problems, some of them of a legal nature, and it would be an extreme burden to require its regularly employed counsel to drop completely all other matters so as to attempt to prepare briefs within the shortened time proposed.

3. It is our judgment that the postponement of the hearing of the appeal in this case would not adversely affect the completion of the reorganization of the St. Louis Southwestern Railway Company. The investment of the Southern Pacific Company in the St. Louis Southwestern Railway Company is great. In addition to owning approximately 87% of the stock of all classes of that Railway Company, it owns a note which it took over from the Reconstruction Fi-

Finance Corporation in the face amount of \$17,882,250, for which there is pledged \$23,903,000 of the St. Louis Southwestern Railway Company's General and Refunding Mortgage Five-Per Cent. Gold Bonds. Consequently, the concern of Southern Pacific Company in the speedy reorganization of the St. Louis Southwestern Railway Company is as great as that of any other party to this appeal. The plan proposed by the Examiner of the Interstate Commerce Commission for reorganization of that Company which is now before the Interstate Commerce Commission upon exceptions, provided a reservation of preferred stock to take care of an allowance on account of the guilder value of First Terminal and Unifying Bonds if the position of the appellant herein is sustained, and under the Examiner's plan, it is perfectly possible for the reorganization plan to be submitted to the security holders prior to the final determination of the issues in this case. It must be recognized that there will be many problems to be solved in connection with the reorganization plan of the railroad, and in our judgment the setting of this appeal out of its regular course will not result, to any degree, in expediting the reorganization of the Railway Company. It will be months before the Commission will hear arguments and formulate a Commission plan, and such plan must thereafter go to the District Court having jurisdiction, with provision for appeal to this Court. As to other claimants of guilders on account of First Terminal and Unifying Bonds in the bankruptcy proceeding, no disadvantage will accrue to them on account of this appeal not being expedited as their claims may be presented to the Referee for trial now or later in the year, as they may elect.

4. It is understood that the Trustee and his counsel desire to take a neutral position in regard to this motion to expedite the appeal because they do not wish, as Trustee's counsel, to oppose a motion by any party to expedite any of the proceedings. Because of the interest of the Southern Pacific Company in the stock of the St. Louis Southwestern Railway Company, it urges that counsel for the other appellées as well as its own counsel should be given sufficient time for the preparation of this important case.

Respectfully submitted,

BEN C. DEY,
GEORE L. BULAND,
Attorneys for Southern Pacific Company.

State of New York,
County of New York—ss.

I, George L. Buland, being first duly sworn, say that I am one of the attorneys for the appellee, Southern Pacific Company, herein, and the facts stated above are true, as I verily believe.

GEORGE L. BULAND.

Subscribed and sworn to before me this 31st day of March, 1938.

(Notarial Seal)

WARREN FAIRBROOK,
Notary Public, New York County
Clerk's No. 5, Register's No. 9F-41.

Commission Expires March 30, 1939.

(Endorsed): No. 11,172. Statement by Appellee Southern Pacific Company in opposition to Motion to Suspend Rules and for Special Setting of this Appeal. Filed in U. S. Circuit Court of Appeals on April 4, 1938.

(Order of U. S. Circuit Court of Appeals Advancing Causes for Hearing and as to Time for Filing Transcript of Record, and Briefs, etc.)

United States Circuit Court of Appeals,
Eighth Circuit.

March Term, 1938.

Monday, April 4, 1938.

In the Matter of:

St. Louis Southwestern Railway Company, Debtor.
Guaranty Trust Company of New York, as Trustee under
St. Louis Southwestern Railway Company First Terminal and Unifying Mortgage dated January 1, 1912,
Appellant,

No. 11,172. vs.

Berryman Henwood, Trustee of St. Louis Southwestern Railway Company, Debtor, St. Louis Southwestern Railway Company and Southern Pacific Company, Appellees.

Appeal from the District Court of the United States for the Eastern District of Missouri.

This matter coming before the Court on the motion of appellant to advance the cause for early hearing and the Court

having heard counsel and having considered the objections presented by counsel for the Southern Pacific Company, and being fully advised,

It is Ordered that this cause be advanced for hearing at a date hereafter to be fixed; that the record in the consolidated appeals be filed with the Clerk of this Court on or before the 15th day of April, 1938; that the brief of appellant be filed and served on or before April 25, 1938; that the brief or briefs of appellees be served and filed on or before May 25, 1938.

April 4, 1938.

(Waiver of Joinder as Party to Appeals by St. Louis Union Trust Company, as Trustee, etc.)

In the United States Circuit Court of Appeals for the Eighth Circuit.

Guaranty Trust Company of New York, as Trustee under St. Louis Southwestern Railway Company First Terminal and Unifying Mortgage dated January 1, 1912, Appellant,

vs.

Berryman Henwood, Trustee of St. Louis Southwestern Railway Company, Debtor, St. Louis Southwestern Railway Company, and Southern Pacific Company, Appellees.

Guaranty Trust Company of New York, as Trustee under St. Louis Southwestern Railway Company First Terminal and Unifying Mortgage dated January 1, 1912, having filed its proof of claim and supplement thereto in a proceeding in the District Court of the United States for the Eastern Division of the Eastern District of Missouri, entitled "In the Matter of St. Louis Southwestern Railway Company, Debtor, In Proceedings for Reorganization of a Railroad, No. 8497", and protests and supplemental protests thereto having been filed by Berryman Henwood, Trustee of said Debtor, by said Debtor, and by the Southern Pacific Company, pursuant to orders of said District Court permitting the filing of protests, and no other protests to said claim having been filed, and a hearing having been had on said protests and supplements thereto, and an order having been entered by said United States District Court on March 21, 1938, allowing in part and disallowing in part said proof of claim, and said Guaranty Trust Company of New York, as such Trustee, having taken appeals both in said United States District

Court and the United States Circuit Court of Appeals for the Eighth Circuit from said order against said protestants as appellees, the said orders allowing said appeals being entered respectively on April 2, 1938, and April 4, 1938, the undersigned does hereby consent to said appeals being heard without the undersigned being joined as a party thereto.

Dated April 8, 1938.

**ST. LOUIS UNION TRUST
COMPANY,**

as Trustee of the Central Arkansas and Eastern Railroad Company First Mortgage.

By Bryan, Williams, Cave &
McPheeters, Its Attorneys.

(Endorsed): No. 11,172. Waiver of Joinder as party to appeals by St. Louis Union Trust Company, as Trustee, etc. Filed in U. S. Circuit Court of Appeals on April 14, 1938.

(Waiver of Joinder as party to appeals by the Protective Committee for Stephenville North and South Texas and Central Arkansas and Eastern Bondholders.)

Guaranty Trust Company of New York, as Trustee under St. Louis Southwestern Railway Company First Terminal and Unifying Mortgage dated January 1, 1912, having filed its proof of claim and supplement thereto in a proceeding in the District Court of the United States for the Eastern Division of the Eastern District of Missouri, entitled "In the Matter of St. Louis Southwestern Railway Company, Debtor, In Proceedings for Reorganization of a Railroad, No. 8497", and protests and supplemental protests thereto having been filed by Berryman Henwood, Trustee of said Debtor, by said Debtor, and by the Southern Pacific Company, pursuant to orders of said District Court permitting the filing of protests, and no other protests to said claim having been filed, and a hearing having been had on said protests and supplements thereto, and an order having been entered by said United States District Court on March 21, 1938, allowing in part and disallowing in part said proof of claim, and said Guaranty Trust Company of New York, as such Trustee, having taken appeals both in said United States District Court and the United States Circuit Court of Appeals

for the Eighth Circuit from said order against said protestants as appellees, the said orders allowing said appeals being entered respectively on April 2, 1938, and April 4, 1938, the undersigned does hereby consent to said appeals being heard without the undersigned being joined as a party thereto.

Dated April 7, 1938.

THE PROTECTIVE COMMITTEE FOR
STEPHENVILLE NORTH AND
SOUTH TEXAS AND CENTRAL AR-
KANSAS AND EASTERN BOND-
HOLDERS,

By Edward Greensfelder,

Their Attorneys.

(Endorsed): No. 11,172. Filed in U. S. Circuit Court of Appeals on April 14, 1938.

(Waiver of Joinder as Party to Appeals by Chase National Bank of the City of New York as Trustee, etc.)

Guaranty Trust Company of New York, as Trustee under St. Louis Southwestern Railway Company First Terminal and Unifying Mortgage dated January 1, 1912, having filed its proof of claim and supplement thereto in a proceeding in the District Court of the United States for the Eastern Division of the Eastern District of Missouri, entitled "In the Matter of St. Louis Southwestern Railway Company, Debtor, In Proceedings for Reorganization of a Railroad, No. 8497", and protests and supplemental protests thereto having been filed by Berryman Henwood, Trustee of said Debtor, by said Debtor, and by the Southern Pacific Company, pursuant to orders of said District Court permitting the filing of protests, and no other protests to said claim having been filed, and a hearing having been had on said protests and supplements thereto, and an order having been entered by, said United States District Court on March 21, 1938, allowing in part and disallowing in part said proof of claim, and said Guaranty Trust Company of New York, as such Trustee, having taken appeals both in said United States District Court and the United States Circuit Court of Appeals for the Eighth Circuit from said order against said protestants as appellees, the said orders allowing said appeals being entered respectively on April 2, 1938, and April 4, 1938, the undersigned

does hereby consent to said appeals being heard without the undersigned being joined as a party thereto.

Dated April 7th, 1938.

THE CHASE NATIONAL BANK OF
THE CITY OF NEW YORK, as Trustee under St. Louis Southwestern Railway Company of Texas Dallas Branch First Mortgage dated April 1, 1903.

THE CHASE NATIONAL BANK OF
THE CITY OF NEW YORK, as Trustee under St. Louis Southwestern Railway Company of Texas Lufkin Extension First Mortgage dated August 1, 1903.

By Milbank, Tweed & Hope,

Its Attorneys.

(Endorsed): No. 11,172. Filed in U. S. Circuit Court of Appeals on April 14, 1938.

(Waiver of Joinder as Party to Appeals by Bankers Trust Company, as Trustee, etc.)

Guaranty Trust Company of New York, as Trustee under St. Louis Southwestern Railway Company First Terminal and Unifying Mortgage dated January 1, 1912, having filed its proof of claim and supplement thereto in a proceeding in the District Court of the United States for the Eastern Division of the Eastern District of Missouri, entitled "In the Matter of St. Louis Southwestern Railway Company, Debtor. In Proceedings for Reorganization of a Railroad, No. 8497", and protests and supplemental protests thereto having been filed by Berryman Henwood, Trustee of said Debtor, by said Debtor, and by the Southern Pacific Company, pursuant to orders of said District Court permitting the filing of protests, and no other protests to said claim having been filed, and a hearing having been had on said protests and supplements thereto, and an order having been entered by said United States District Court on March 21, 1938, allowing in part and disallowing in part said proof of claim, and said Guaranty Trust Company of New York, as such Trustee, having taken appeals both in said United States District Court and the United States Circuit Court of Appeals for the Eighth Circuit from said order against said protestants as appellees, the said orders allowing said appeals being entered respectively on April 2, 1938, and April 4, 1938, the undersigned does hereby consent to said appeals being heard without the undersigned being joined as a party thereto.

Dated April 7, 1938.

**BANKERS TRUST COMPANY, as
Trustee of Second Mortgage, etc.,**

By Alexander & Green,

Its Attorneys.

(Endorsed): No. 11,172. Filed in U. S. Circuit Court of Appeals on April 14, 1938.

(Waiver of Joinder as Party to Appeals by President and Board of Directors of The Manhattan Company, etc.)

Guaranty Trust Company of New York, as Trustee under St. Louis Southwestern Railway Company First Terminal and Unifying Mortgage dated January 1, 1912, having filed its proof of claim and supplement thereto in a proceeding in the District Court of the United States for the Eastern Division of the Eastern District of Missouri, entitled "In the Matter of St. Louis Southwestern Railway Company, Debtor, In Proceedings for Reorganization of a Railroad, No. 8497," and protests and supplemental protests thereto having been filed by Berryman Henwood, Trustee of said Debtor, by said Debtor, and by the Southern Pacific Company, pursuant to orders of said District Court permitting the filing of protests, and no other protests to said claim having been filed, and a hearing having been had on said protests and supplements thereto, and an order having been entered by said United States District Court on March 21, 1938, allowing in part and disallowing in part said proof of claim, and said Guaranty Trust Company of New York, as such Trustee, having taken appeals both in said United States District Court and the United States Circuit Court of Appeals for the Eighth Circuit from said order against said protestants as appellees, the said orders allowing said appeals being entered respectively on April 2, 1938, and April 4, 1938, the undersigned does hereby consent to said appeals being heard without the undersigned being joined as a party thereto.

Dated April 7, 1938.

**PRESIDENT AND DIRECTORS OF
THE MANHATTAN COMPANY as
Trustee under Stephenville North &
South Texas Railway Company, First
Mortgage.**

By Root, Clark, Buckner & Ballantine,

Its Attorneys.

(Endorsed): No. 11,172. Filed in U. S. Circuit Court of Appeals on April 14, 1938.

(Waiver of Joinder as Party to Appeals by Chemical Bank & Trust Company, as Trustee, Etc.)

Guaranty Trust Company of New York, as Trustee under St. Louis Southwestern Railway Company First Terminal and Unifying Mortgage dated January 1, 1912, having filed its proof of claim and supplement thereto in a proceeding in the District Court of the United States for the Eastern Division of the Eastern District of Missouri, entitled "In the Matter of St. Louis Southwestern Railway Company, Debtor. In Proceedings for Reorganization of a Railroad, No. 8497", and protests and supplemental protests thereto having been filed by Berryman Henwood, Trustee of said Debtor, by said Debtor, and by the Southern Pacific Company, pursuant to orders of said District Court permitting the filing of protests, and no other protests to said claim having been filed, and a hearing having been had on said protests and supplements thereto, and an order having been entered by said United States District Court on March 21, 1938, allowing in part and disallowing in part said proof of claim, and said Guaranty Trust Company of New York, as such Trustee, having taken appeals both in said United States District Court and the United States Circuit Court of Appeals for the Eighth Circuit from said order against said protestants as appellees, the said orders allowing said appeals being entered respectively on April 2, 1938, and April 4, 1938, the undersigned, does hereby consent to said appeals being heard without the undersigned being joined as a party thereto.

Dated April 6th, 1938.

CHEMICAL BANK & TRUST
COMPANY, Trustee under St.
Louis Southwestern Railway
Company,
By Chadbourne, Hunt, Jaeckel
& Brown,

Its Attorneys.

(Endorsed): No. 11,172. Filed in U. S. Circuit Court of Appeals on April 14, 1938.

(Waiver of Joinder as Party to Appeals By Protective Committee for holders of St. Louis Southwestern Railway Company First Terminal and Unifying Mortgage Bonds.)

Guaranty Trust Company of New York, as Trustee under St. Louis Southwestern Railway Company First Terminal and Unifying Mortgage dated January 1, 1912, having filed

its proof of claim and supplement thereto in a proceeding in the District Court of the United States for the Eastern Division of the Eastern District of Missouri, entitled "In the Matter of St. Louis Southwestern Railway Company, Debtor, In Proceedings for Reorganization of a Railroad, No. 8497", and protests and supplemental protests thereto having been filed by Berryman Henwood, Trustee of said Debtor, by said Debtor, and by the Southern Pacific Company, pursuant to orders of said District Court permitting the filing of protests, and no other protests to said claim having been filed, and a hearing having been had on said protests and supplements thereto, and an order having been entered by said United States District Court on March 21, 1938, allowing in part and disallowing in part said proof of claim, and said Guaranty Trust Company of New York, as such Trustee, having taken appeals both in said United States District Court and the United States Circuit Court of Appeals for the Eighth Circuit from said order against said protestants as appellees, the said orders allowing said appeals being entered respectively on April 2, 1938, and April 4, 1938, the undersigned does hereby consent to said appeals being heard without the undersigned being joined as a party thereto.

Dated April 8, 1938.

**PROTECTIVE COMMITTEE FOR THE
HOLDERS OF ST. LOUIS SOUTH-
WESTERN RAILWAY COMPANY
FIRST TERMINAL AND UNIFYING
MORTGAGE BONDS.**

By James Piper,

Its Attorney.

(Endorsed): No. 11,172. Filed in U. S. Circuit Court of Appeals on April 14, 1938.

**Waiver of Joinder as Party to Appeals By Frank C. Rand,
Successor Co-Trustee, Etc.)**

**In the United States Circuit Court of Appeals For the
Eighth Circuit**

**Guaranty Trust Company of New York, as Trustee under St.
Louis Southwestern Railway Company First Terminal
and Unifying Mortgage dated January 1, 1912, Appellant,**

vs.

**Berryman Henwood, Trustee of St. Louis Southwestern Rail-
way Company, Debtor, St. Louis Southwestern Railway
Company, and Southern Pacific Company, Appellees.**

**Guaranty Trust Company of New York, as Trustee under
Louis Southwestern Railway Company First Terminal and**

Unifying Mortgage dated January 1, 1912, having filed its proof of claim and supplement thereto in a proceeding in the District Court of the United States for the Eastern Division of the Eastern District of Missouri, entitled "In the Matter of St. Louis Southwestern Railway Company, Debtor, In Proceedings for Reorganization of a Railroad, No. 8497", and protests and supplemental protests thereto having been filed by Berryman Henwood, Trustee of said Debtor, by said Debtor, and by the Southern Pacific Company, pursuant to orders of said District Court permitting the filing of protests, and no other protests to said claim having been filed, and a hearing having been had on said protests and supplements thereto, and an order having been entered by said United States District Court on March 21, 1938, allowing in part and disallowing in part said proof of claim, and said Guaranty Trust Company of New York, as such Trustee, having taken appeals both in said United States District Court and the United States Circuit Court of Appeals for the Eighth Circuit from said order against said protestants as appellees, the said orders allowing said appeals being entered respectively on April 2, 1938, and April 4, 1938, the undersigned does hereby consent to said appeals being heard without the undersigned being joined as a party thereto.

Dated April 13, 1938.

FRANK C. RAND,

Successor Co-Trustee under Mortgage
dated January 1, 1912, of St. Louis
Southwestern Railway Company securing
First Terminal and Unifying
Mortgage Bonds,

By Thompson, Mitchell, Thompson
& Young

Richard D. Shewmaker

His Attorneys.

(Endorsed): No. 11,172. Filed in U. S. Circuit Court of
Appeals on April 14, 1938.

239 And thereafter the following proceedings were had in said causes in the Circuit Court of Appeals, viz.:

(Appearance of Counsel for Appellant in Cause No. 11172.)

United States Circuit Court of Appeals
Eighth Circuit

Guaranty Trust Company of New York, as trustee, etc.,
Appellant.

No. 11,172. vs.

Berryman Henwood, Trustee of St. Louis Southwestern Railway Company, Debtor, et al.

The Clerk will enter my appearance as Counsel for the Appellant.

DAVIS, POLK, WARDWELL,
GARDINER & REED,
EDWIN S. S. SUNDERLAND,
RALPH M. CARSON,
MALCOLM FOOSHEE,
THOMPSON, MITCHELL,
THOMPSON & YOUNG,
GUY A. THOMPSON,
JOHN M. HOLMES.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Apr. 2, 1938.

240 (Appearance of Mr. A. H. Kiskaddon and Mr. Carleton S. Hadley as Counsel for Appellees in Cause No. 11172.)

The Clerk will enter my appearance as Counsel for the Appellees.

A. H. KISKADDON,
CARLETON S. HADLEY.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Apr. 12, 1938.

(Appearance of Mr. Ben C. Dey as Counsel for Appellee Southern Pacific Co. in Cause No. 11172.)

The Clerk will enter my appearance as Counsel for the Appellee, Southern Pacific Co.

BEN C. DEY,
165 Broadway, New York, N. Y.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Apr. 27, 1938.

(Appearance of Mr. George L. Buland as Counsel for Appellee Southern Pacific Co., in Cause No. 11172.)

The Clerk will enter my appearance as Counsel for the Appellee, Southern Pacific Co.

GEORGE L. BULAND,
165 Broadway, New York, N. Y.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Apr. 27, 1938.

241 (Appearance of Counsel for Amicus Curiae, Anglo-Continentale Treuhand, A. G., et al., in Cause No. 11172.)

The Clerk will enter my appearance as Counsel for the Anglo-Continentale Treuhand, A. G., et al.

HARRY HOFFMAN,
30 Pine Street,
New York.

WAYNE ELY,
Bank of Commerce Bldg.,
St. Louis.

LYON ANDERSON,
Bank of Commerce Bldg.,
St. Louis.

(Endorsed): Filed in U. S. Circuit Court of Appeals, May 14, 1938.

(Appearance of Mr. W. D. Whitney and Mr. Robert D. Blasier as Counsel for Amicus Curiae, Cravath, deGersdorff, Swaine and Wood, et al., in Cause No. 11172.)

The Clerk will enter my appearance as Amicus Curiae.

W. D. WHITNEY,
CRAVATH, DEGERSDORFF,
SWAINE and WOOD,
ROBERT D. BLASIER,
Post Office Address—
15 Broad St., New York, N. Y.

(Endorsed): Filed in U. S. Circuit Court of Appeals, May 25, 1938.

242 (Appearance of Mr. Horace R. Lamb as Counsel for Amicus Curiae, Cravath, deGersdorff, Swaine & Wood, et al., in Cause No. 11172.)

The Clerk will enter my appearance as Amicus Curiae.

LEBOEUF, MACHOLD and LAMB,
By Horace R. Lamb,
Amicus Curiae Attorneys for Niagra,
Lockport & Ontario Power Company,
15 Broad Street, New York City, N. Y.

(Endorsed): Filed in U. S. Circuit Court of Appeals, May 25, 1938.

(Appearance of Mr. Ralph M. Carson, Mr. Malcolm Fooshee and Mr. Edwin S. S. Sunderland as Counsel for Appellant in Cause No. 11182.)

United States Circuit Court of Appeals
Eighth Circuit.

Guaranty Trust Company of New York, as Trustee, etc.,
Appellant,

No. 11182. vs.

Berryman Henwood, Trustee of St. Louis Southwestern Railway Company, Debtor, et al.

The Clerk will enter my appearance as Counsel for the Appellant.

RALPH M. CARSON,
MALCOLM FOOSHEE;
EDWIN S. S. SUNDERLAND.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Apr. 26, 1938.

243 (Appearance of Mr. Guy A. Thompson and Mr. John M. Holmes as Counsel for Appellant in Cause No. 11182.)

The Clerk will enter my appearance as Counsel for the Appellant.

GUY A. THOMPSON,
JOHN M. HOLMES,
THOMPSON, MITCHELL, THOMP-
SON & YOUNG.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Apr. 26, 1938.

(Appearance of Mr. A. H. Kiskaddon and Mr. Carleton S. Hadley as Counsel for Appellees in Cause No. 11182.)

The Clerk will enter my appearance as Counsel for the Appellees.

A. H. KISKADDON,
CARLETON S. HADLEY.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Apr. 26, 1938.

(Appearance of Mr. Ben C. Dey as Counsel for Appellee, Southern Pacific Co., in Cause No. 11182.)

The Clerk will enter my appearance as Counsel for the Appellee Southern Pacific Co.

BEN C. DEY,
165 Broadway, New York, N. Y.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Apr. 27, 1938.

244 (Appearance of Mr. George L. Buland as Counsel for Appellee Southern Pacific Co., in Cause No. 11182.)

The Clerk will enter my appearance as Counsel for the Appellee Southern Pacific Co.

GEORGE L. BULAND,
165 Broadway, New York, N. Y.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Apr. 27, 1938.

(Appearance of Mr. W. D. Whitney and Mr. Robert D. Blasier as Counsel for Amicus Curiae, Cravath, deGersdorff, Swaine & Wood, et al., in Cause No. 11182.)

The Clerk will enter my appearance as Amicus Curiae.

W. D. WHITNEY,
CRAVATH, DEGERSDORFF,
SWAINE & WOOD,
ROBERT D. BLASIER,
Post Office Address—
45 Broad St., New York, N. Y.

(Endorsed): Filed in U. S. Circuit Court of Appeals, May 25, 1938.

(Appearance of Mr. Horace R. Lamb as Counsel for Amicus Curiae, Crayath, deGersdorff, Swaine & Wood, et al., in Cause No. 11182.)

The Clerk will enter my appearance as Amicus Curiae.

LEBOEUF, MACHOLD and LAMB,
By Horace R. Lamb,
Amicus Curiae Attorneys for Niagra,
Lockport & Ontario Power Company,
15 Broad Street, New York City, N. Y.

245 (Endorsed): Filed in U. S. Circuit Court of Appeals,
May 25, 1938.

(Appearance of Counsel for Amicus Curiae, Anglo-Continental Treuhand, A. G., et al., in Cause No. 11182.)

The Clerk will enter my appearance as Counsel for the Anglo-Continental Treuhand, A. G., et al., Amici Curiae.

HARRY HOFFMAN,
(of New York) 30 Pine St.,
New York.

WAYNE ELY,
LYON ANDERSON,
of St. Louis,
Bank of Commerce Bldg.,
St. Louis, Mo.

(Endorsed): Filed in U. S. Circuit Court of Appeals, May 28, 1938.

(Concurrence in and Approval of Appeals and Brief of Appellant by Bondholders Protective Committee, in Causes Nos. 11172 and 11182.)

In the Matter of

St. Louis Southwestern Railway Company, Debtor.

Guaranty Trust Company of New York, as Trustee under St. Louis Southwestern Railway Company First Terminal and Unifying Mortgage dated January 1, 1912, Appellant,

Nos. 11,172, 11,182 vs. In Bankruptcy

Berryman Henwood, Trustee of St. Louis Southwestern Railway Company, Debtor, St. Louis Southwestern Railway Company, and Southern Pacific Company, Appellees.

246 Appeals from the United States District Court for the Eastern District of Missouri, Eastern Division.

Honorable Charles B. Davis, Trial Judge.

E. Stanley Glines, W. Rodman Peabody and J. Hambleton Ober, as the Protective Committee for holders of St. Louis Southwestern Railway Company First Terminal and Unifying Mortgage Bonds, praying the indulgence of the Court thereto, state that they were and are interveners in the proceeding entitled "In the Matter of St. Louis Southwestern Railway Company, Debtor" aforesaid, and by counsel participated in the hearing and argument of the claim of the appellant, Guaranty Trust Company of New York, as Trustee under the mortgage securing said bonds; that they fully approved and do approve of these appeals taken by the said mortgage trustee from the order of the District Court entered on March 21, 1938, from which said appeals were taken, and did not join therein or become a party thereto solely because they considered the interests of all the holders of said bonds to be fully represented and protected by these appeals of the said Guaranty Trust Company of New York as such mortgage trustee; that through their counsel they have carefully read and fully approve of and concur in the brief for said Appellant Guaranty Trust Company of New York as Trustee aforesaid, filed or to be filed herein.

Dated April 26, 1938.

Respectfully submitted,

JAMES PIPER,

HENRY S. CAULFIELD,

Attorneys for Protective Committee
for Holders of St. Louis Southwestern
Railway Company First Terminal and Unifying Mortgage Bonds.

247 We consent to the filing of the within instrument of concurrence, etc.

A. H. KISKADDON,

CARLETON S. HADLEY,

Attorneys for Berryman Henwood,
Trustee, and for Debtor.

BEN C. DEY,

GEORGE L. BULAND,

Attorneys for Southern Pacific Co.
Attorneys for Appellees.

THOMPSON, MITCHELL,
THOMPSON & YOUNG,
JOHN M. HOLMES,

Attorneys for Appellant.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Apr. 28, 1938.

(Order of Submission in Causes Nos. 11172 and 11182.)

May Term, 1938.

Saturday, May 28, 1938.

These causes having been called for hearing in their regular order, the Court upon application of counsel allowed three hours for oral argument, and thereupon argument was made by counsel as follows: Mr. Ralph M. Carson for appellant, Mr. Harry Hoffman for Anglo-Continentale Treuhand, A. G., et al., Amici Curiae, on the side of appellant, Mr. A. H. Kiskaddon and Mr. Carleton S. Hadley for appellee Berryman Henwood, Trustee, etc., Mr. George L. Buland for appellee Southern Pacific Company, Mr. William D. Whitney for Cravath, deGersdorff, Swaine & Wood, et al., Amici Curiae, on the side of appellee, and Mr. Guy A. Thompson for appellant.

Thereupon, these causes were submitted to the Court on the transcript of the record from said District Court and the briefs of counsel filed herein, with leave to appellant to file reply brief instant.

248 (Opinion in Causes Nos. 11172 and 11182.)

United States Circuit Court of Appeals
Eighth Circuit.

No. 11,172.—MAY TERM, A. D. 1938.

Guaranty Trust Company of New
York, as Trustee under St. Louis
Southwestern Railway Company
First Terminal and Unifying Mort-
gage dated January 1, 1912,

Appellant,

vs.

Berryman Henwood, Trustee of St.
Louis Southwestern Railway Com-
pany, Debtor, St. Louis Southwest-
ern Railway Company, and South-
ern Pacific Company,

Appeal from the Dis-
trict Court of the
United States for the
Eastern District of
Missouri.

No. 11,182.—MAY TERM, A. D. 1938.

Guaranty Trust Company of New York, as Trustee under St. Louis Southwestern Railway Company First Terminal and Unifying Mortgage dated January 1, 1912,

Appellant,

vs.

Berryman Henwood, Trustee of St. Louis Southwestern Railway Company, Debtor; St. Louis Southwestern Railway Company, and Southern Pacific Company,

Appellees.

Appeal from the District Court of the United States for the Eastern District of Missouri.

[July 13, 1938.]

Mr. Ralph M. Carson and Mr. Guy A. Thompson (Mr. Edwin S. S. Sunderland, Mr. John M. Holmes and Mr. Malcolm Fooshee were with them on the brief) for appellant.

Mr. A. H. Kiskaddon and Mr. Carleton S. Hadley for appellee, Berryman Henwood, Trustee.

Mr. George L. Buland (Mr. Ben C. Dey was with him on the brief) for appellee Southern Pacific Company.

Mr. Harry Hoffman (Mr. Wayne Ely and Mr. Lyon Anderson were with him on the brief) for Anglo-Continentale Treuhand, A. G., et al., amici curiae.

Mr. William D. Whitney (Messrs. Cravath, de Gersdorff, Swaine and Wood, Messrs. Le Boeuf, Machold and Lamb, Mr. Horace R. Lamb and Mr. Robert D. Blasier were with him on the brief) for amici curiae Cravath, de Gersdorff, Swaine and Wood, et al.

Before STONE, SANBORN and VAN VALKENBURGH, Circuit Judges.

STONE, Circuit Judge, delivered the opinion of the court.

As of January 1, 1912, the St. Louis Southwestern Railway Company (a Missouri corporation) executed a deed of trust (First Ter-

minimal and Unifying Mortgage) securing an issue of bonds. That company is now in administration under Section 77 of the Bankruptcy Act as amended (U. S. C. A. Title 11, Sec. 205). Appellant, as trustee in the deed of trust, filed a claim for the bondholders asserting a right to payment⁽¹⁾ in Dutch guilders instead of dollars and for allowance of the claim in an amount of dollars equal to such guilder value. Objections were filed to such payment and allowance—there being no objection to allowance on the basis of payment in dollars. From an order allowing the claim in dollar but denying it in guilder value, the trustee prosecutes an appeal allowed by this Court and also one allowed by the District Court.

The deed of trust provided both for coupon bonds and registered bonds. This claim of the trustee has to do only with coupon bonds. As to such, both the deed of trust and the bonds (including interest coupons) contained similar multiple currency provisions which were expressed as follows (taken from the bonds): the company promises to pay "at its office or agency in the Borough of Manhattan, City and State of New York, One Thousand Dollars in gold coin of the United States of America, of or equal to the standard of weight and fineness as it existed January 1, 1912, or in London, England, £205 15s 2d, or in Amsterdam, Holland, 2490 guilders, or in Berlin, Germany, marks 4200, D.R.W., or in Paris, France, 5180 francs". The definite amounts in the various foreign currencies set forth represent the exchange value of \$1,000.00 in gold in each of those currencies as of the date January 1, 1912. The outstanding controversy in this court, as in the trial court, is whether these provisions of the deed of trust and of the bonds (including interest coupons) giving an option of payment in currencies other than American gold dollars is rendered nugatory by the Joint Resolution of Congress, approved June 5, 1933 (48 Stat. 112, U. S. C. A. Title 31, Sec. 463).

This is a matter of the construction of the Joint Resolution. The particular language of the Resolution involved here is Section 1 reading as follows:

"That (a) every provision contained in or made with respect to any obligation which purports to give the obligee a right to require payment in gold or a particular kind of coin or currency,

(1) The use of the word "payment" is not accurate in the sense of actual receipt of payment. All parties recognize that there will be no actual payment of these bonds in connection with this Debtor proceeding. The purpose in demanding payment in guilders is to increase the dollar allowance of the claim above the par dollar value of the bonds and interest coupons. Such would be the effect. The advantage would flow from the increased amount of this class of indebtedness in working out any plan of reorganization.

or in an amount in money of the United States measured thereby, is declared to be against public policy; and no such provision shall be contained in or made with respect to any obligation hereafter incurred. Every obligation, heretofore or hereafter incurred, whether or not any such provision is contained therein or made with respect thereto, shall be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts. . . .

(b)—As used in this resolution, the term 'obligation' means an obligation (including every obligation of and to the United States excepting currency) payable in money of the United States; and the term 'coin or currency' means coin or currency of the United States, including Federal Reserve notes and circulating notes of Federal Reserve banks and national banking associations."

The line of cleavage arises here because of two things springing from the above quoted statement in the deed of trust and the bonds giving an option to the bondholder to elect payment in United States gold coins of a given weight and fineness or in any of the named foreign currencies. The first of these things is that this provision gives a clear right to payment in gold dollars. The second is that it does not require payment in such dollars only. That is, the obligation *may be* but need *not necessarily be* paid in gold dollars. For reasons to be stated, appellant contends that the Resolution covered only such obligations as *must* be paid in gold dollars or the equivalent measurement of other United States currencies. Appellees contend that the Resolution covers obligations which *may be* so paid.

Appellant bases its construction both upon existing judicial construction⁽²⁾ of the Resolution and upon its own independent construction. First, as to judicial construction. Appellant relies mainly upon *Anglo-Continentale Treuhand A. G. v. St. Louis Southwestern Railway Co.*, 81 Fed. (2d) 11 (C. C. A. 2) and *McAdoo v. Southern Pac. Co.*, 10 Fed. Supp. 953 (D. C. N. D. Cal.). Each of those cases decided that the Resolution did not cover multiple currency provisions, such as here—the former case involving bonds of the same issue as before us. The argument of

(2) Chief reliance is placed upon *Anglo-Continentale Treuhand A. G. v. St. Louis Southwestern Railway Co.*, 81 Fed. (2d) 11 (C. C. A. 2, certiorari denied 298 U. S. 655) and *McAdoo v. Southern Pac. Co.*, 10 Fed. Supp. 953 (D. C. N. D. Cal.). Also, appellant cites *City Bank Farmers' Trust Co. v. Bethlehem Steel Co.*, 214 App. Div. (N. Y.) 634, 280 N. Y. Supp. 424; *Anglo-Continentale Treuhand A. G. v. Southern Pacific Co.*, 299 N. Y. Supp. 859, aff'd 251 App. Div. 803, 295 N. Y. Supp. 181; *Anglo-Continentale Treuhand A. G. v. Bethlehem Steel Co.*, N. Y. L. J. Oct. 15, 1937; *Nederlandsche Middenstandsbank N. Y. v. Bethlehem Steel Co.*, N. Y. L. J. June 13, 1936, and *Zurich General Accident and Liability Ins. Co., Ltd. v. Lackawanna Steel Co.*, 299 N. Y. Supp. 862.

appellant that the denial of certiorari by the Supreme Court in the former case should be given weight in the construction of the statute cannot be allowed (*Atlantic Coast Line Railroad Co. v. Pope*, 283 U. S. 401, 403; *United States v. Carver*, 260 U. S. 482, 490). Both the Anglo-Continentale and the McAdoo opinions reveal the same reasoning in reaching a decision. That reasoning is that the language of the Resolution is clear and unambiguous and means obligations which *must* be paid in United States gold dollars or the equivalent thereof in other United States money.

We are fully conscious of the fine ability of the Judges who wrote and concurred in the opinions urged by appellant; and we are sensitive to the desirability of harmony in the decisions of the various Circuits. However, we are not permitted thus to relieve ourselves of the duty of examining and determining for ourselves the issues coming before us. Where we have serious doubt or the determination is close, we are inclined to give solid weight to the consideration of harmony in decision. In this instance, we are unable to conclude that the Resolution is, as to the matter here, unambiguous. The crucial word "payable" is, standing alone, not confinable to one single definite meaning.⁽¹⁾ Nor is there such single meaning in a legal sense (48 C. J. 574). The meaning of the word can only be determined in the light of the situation and circumstances of its use. Our definition must be sought in the context of the Resolution and, if that does not clearly determine the matter, in such aids to construction as are permissible.

Turning first to the Resolution itself. We are unable to find in any part of the Resolution anything which expressly determines this construction—that is, there is no expression, on one hand stating that the obligation *must* be payable *only* in United States gold or United States money, or, on the other hand, that payment in multiple currencies, including United States gold, is included. There are particular expressions in the Resolution—such as "a right to require payment in gold or a particular kind of coin or currency of the United States, or in an amount in money of the United States measured thereby" and "provision . . . which purports to give the obligee a right to require payment in gold or

(1) For example, Webster's New, International Dictionary (1931 Ed.) defines "payable" as

"1. That may, can, or should be paid; justly due.

"2. *Law.* a That may be discharged or settled by delivery of value. b That is to be paid (by any particular person); as, bills *payable*; also, matured or maturing; due.

"3. Likely or able to yield a profit; profitable; as, *payable* wash dirt; a payable commercial undertaking.

a particular kind of coin or currency, or in an amount in money of the United States measured thereby"—which are pertinent to our inquiry but each of them is, in itself, consistent with either of the opposed constructions here urged. In this situation, the Resolution is, therefore, not clear and hence is ambiguous.

When we take the Resolution as a whole we find, in its contents and wording, no further aid. We find ourselves in somewhat the situation presented in *Holyoke Water Power Co. v. American Writing Paper Co.*, 300 U. S. 324, which involved another form of alternative payment and where the Court was driven to determine construction and application of this Resolution by resort to considerations of "the evil to be remedied" (pp. 338, 339) and whether the particular contract provision involved there was within the evil. In such a status, we must conclude that the expressions in the Resolution, critical here, are ambiguous. So believing, the reasoning (of the cited cases), based upon the view that the Resolution is unambiguous, cannot be followed by us.

As to construction independent of the persuasive authority of the above decisions, appellant urges the following: (1) the first sentence of paragraph (a) of the section declares only "gold clauses" to be against public policy and nothing else is invalidated—no attempt to nullify foreign money alternatives can be found in the Resolution; (2) the words "obligation" and "payable", as used in the Resolution, mean "the absolute legal obligation or duty to pay in dollars"; (3) the sole purpose of the Resolution was to nullify "gold clauses" and there was no intention to affect obligations payable in foreign currencies; (4) the guilder alternative is of equal rank with the dollar alternative and is not equivalent to a promise to pay gold or money of the United States measured by gold.

We shall not treat each of the above four contentions separately but will include the substance of them in one discussion. Regarding ambiguity as existent in the Resolution and since the ambiguous portions are consistent with either of the here opposed contentions, we are pointed a proper method of solution in the *Holyoke Water Power Company case, supra*. That method is consideration of the evil intended to be prevented by the Resolution and the relation to that evil of the provisions for payment in multiple currencies here involved. The great purpose of the Resolution was expressed in the title: "To assure uniform value to the coins and currencies of the United States." The Chief Justice has expressed the purpose as an undertaking "to establish a uniform currency, and

parity between kinds of currency, and to make that currency dollar for dollar, legal tender for the payment of debts (*Norman v. B. & O. R. Co.*, 294 U. S. 240, 316). Justice Brandeis has concisely stated the same as "the maintenance of our monetary system" (*Holyoke Water Power Co. v. American Writing Paper Co.*, 300 U. S. 325, 340). The Preamble of the Resolution further declared the purpose as being "to maintain at all times the equal power of every dollar, coined or issued by the United States, in the markets and in the payment of debts."

The Preamble further declared that such purpose was obstructed by existing contracts containing provisions "which purport to give the obligee a right to require payment in gold or a particular kind of coin or currency of the United States, or in an amount in money of the United States measured thereby." To remove such obstruction, such provisions were nullified to the extent that they went beyond the requirement of payment "dollar for dollar, in any coin or currency [of the United States] which at the time of payment is legal tender for public and private debts." In short, the evil struck at by the Resolution was contract provisions purporting "to give the obligee a right to require payment in gold or a particular kind of coin or currency of the United States, or in an amount in money of the United States measured thereby"—as defined in paragraph (b), "payable in money of the United States." The reason why this is an evil and the reason for preventing it being to prevent obstruction of the maintenance of the equal value of the various United States monies "in the markets and in the payment of debts."

With the evil and the reason for prevention in mind, we examine the provisions of the instruments before us to ascertain whether they fall within or without that evil and that reason as so expressed. The provision in the bonds (typical of those in the deed of trust and in the interest coupons) is that the obligor promises to pay "at its office or agency in the Borough of Manhattan, City and State of New York, One Thousand Dollars in gold coin of the United States of America, of or equal to the standard of weight and fineness as it existed January 1, 1912, or in London, England, £205 15s 2d, or in Amsterdam, Holland, 2490 guilders, or in Berlin, Germany, marks 4200, D.R.W. or in Paris, France, 5180 francs."

That portion of the provision reading payment "at its office or agency in the Borough of Manhattan, City and State of New York, One Thousand Dollars in gold coin of the United States of America,

of or equal to the standard of weight and fineness as it existed January 1, 1912" clearly is a provision "which purports to give the obligee a right to require payment in gold" and in "a particular kind of coin"—the weight and fineness being specified—of the United States.

The amount of guilders, pounds, francs or marks which might be elected by the obligee was, admittedly, determined by the value of the gold dollar as of January 1, 1912. The only effect of stating the precise amounts in those foreign currencies was to make definite and certain what might have been expressed as "guilders, pounds, francs or marks which would be the equivalent of their values on January 1, 1912, as measured by the value of one thousand gold dollars of the weight and fineness as of that date."

In this situation, what can normally take place and what is, in fact, here desired by appellant and will take place if the view of appellant be accepted is as follows: one class of creditors of a domestic corporation doing a purely domestic business will, in a United States court of bankruptcy and in a reorganization proceeding, secure a decided advantage not warranted by the dollar value of their obligations as controlled by the Resolution⁽⁴⁾; and such advantage will be secured purely by a calculation of the value in United States dollars of a foreign money—such value being brought about by the provisions of an obligation fixing the amount of such foreign money based on the value of the gold dollar of a specified weight and fineness.

The provision may or may not have had an entirely proper business purpose of making the bonds attractive to investors in Holland, England, France and Germany by providing for payment in the money of such countries within those countries. But it is the effect and not the purpose which is important. The effect is to freeze the unit of payment as of the gold dollar of the weight and fineness of January 1, 1912. The provision afforded a facile method by which every bond and interest coupon of the indebtedness—whether owned abroad or in this country—could be easily converted into payment in domestic gold dollars of a given weight

(4) The allowance here covered 5636 bonds of one thousand dollars each. Exclusive of interest, the allowance on principal was \$5,836,000. The amount which would have been allowed had the guilder option been enforced as asked would have been \$9,512,001.19. The difference—\$3,676,001.19—arises from the difference in dollar value of the guilder in 1912 and at the dates of payment claimed by appellant to be here involved. In 1912, the dollar value of the guilder was \$3.4620; at the dates here claimed to be involved, such value was \$.620567. The lowest dollar value of the guilder in this record at any date subsequent to the filing of this debtor proceeding is \$.5560. The advantage thus obtained, if appellant should prevail, would be a gain over face dollar value of these bonds of \$3,676,001.19 or slightly over \$2,158,588.00 dependent on whether the guilder is valued at \$.620567 or at \$.5560.

and fineness or the foreign money (measured thereby) most advantageous to the holder at the time of payment. Since the face amount of the obligations is calculated in terms of the gold dollar at a specific date, the real effect is to give an option of payment in the most advantageous money (foreign or domestic) which, at the time of payment, nearest approaches the specified gold dollar value. By the simple expedient of immediately purchasing "dollars" after securing payment in guilders, pounds, marks or francs, the holder acquires, within the United States, a substantial premium over what could have been realized by receipt of payment in the United States. Hence, the holder is secured from depreciation of the gold dollar not only by a gold clause provision but by a four-fold further assurance in these foreign currencies of values based on the specified gold dollar. Thus by running around an international stump—passing through Holland en route—the holder of every bond and coupon enriches himself substantially at the expense of the debtor and of other creditors. Here, the same result (with further saving of exchange charges) is reached merely through a formal demand in Holland for payment (known to be futile) and by a simple mathematical calculation. Also, this in a situation where no payment is possible but where the above advantage will increase the indebtedness of the debtor and, therethrough, the participation of these holders in the property reorganization at the expense of every other person financially interested in that property.

Such a result would be squarely within a situation similar to that expressed by the Chief Justice in outlining the effect of devaluation of the dollar (*Norman v. B. & O. R. Co.*, 294 U. S. 240, 315). Clearly, such result so reached would interfere with the purpose of the Joint Resolution (expressed in its title) "To assure uniform value to the coins and currencies of the United States" which was to be accomplished through enforcement of "the declared policy of the Congress to maintain at all times the equal power of every dollar, coined or issued by the United States, in the markets and in the payment of debts" by striking down all private obligations requiring payment "in a particular kind of coin or currency. In short, the evil sought to be avoided by the Resolution is accomplished by a form of indirection and, to that extent, the purposes of the Resolution and, therefore, the Resolution itself defeated. We think such a result brings these instruments within the intentment of the Resolution and within the ambiguous expressions, set out hereinabove, of the Resolution. The vice of these instruments, in the view of the Resolution, is that they provide for payment in

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gold dollars of a specified weight and fineness or, optionally with the holders, in foreign currencies, the amount or value of which is based upon that gold dollar.

In what has been stated above, we have had in mind the situation before us. Whether a contract arising out of transactions between citizens and foreigners—such, for example, as purchase of foreign goods by citizens—wherein payment was provided at foreign cities in foreign currencies, even if such currencies were measured by defined gold dollars, is without our present consideration. Also, we have not considered contracts involving satisfaction in gold as a commodity. While foreign currencies are, if within this country, “commodities” in the sense that they have no standing as mediums of exchange, yet the contract provisions here provide for “payment” in money only and in foreign monies only within foreign countries. These contracts are money and not commodity contracts.

The order appealed from should be and is

Affirmed.

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(Décreé in Causes Nos. 11172 and 11182.)

United States Circuit Court of Appeals
Eighth Circuit.

May Term, 1938.

Friday, July 15, 1938.

Guaranty Trust Company of New York, as Trustee under St. Louis Southwestern Railway Company First Terminal and Unifying Mortgage dated January 1, 1912, Appellant,

No. 11172. vs.

Berryman Henwood, Trustee of St. Louis Southwestern Railway Company, Debtor, St. Louis Southwestern Railway Company, and Southern Pacific Company.

Appeal from the District Court of the United States for the Eastern District of Missouri allowed by the United States Circuit Court of Appeals.

and

Guaranty Trust Company of New York, as Trustee under St. Louis Southwestern Railway Company First Terminal and Unifying Mortgage dated January 1, 1912, Appellant,

No. 11182. vs.

Berryman Henwood, Trustee of St. Louis Southwestern Railway Company, Debtor, St. Louis Southwestern Railway Company, and Southern Pacific Company.

appeal from the District Court of the United States for the Eastern District of Missouri allowed by the District Court,

29 These causes came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Missouri, and were argued by counsel.

On Consideration Whereof, it is now here ordered, adjudged, and decreed by this Court, that the order of the said District Court appealed from, in these causes be, and the same is hereby, affirmed with costs; and that Berryman Henwood, Trustee of St. Louis Southwestern Railway Company, Debtor, St. Louis Southwestern Railway Company, and Southern Pacific Company have and recover against the Guaranty Trust Company of New York, as Trustee under St. Louis Southwestern Railway Company First Terminal and Unifying Mortgage dated January 1, 1912, the sum of Twenty Dollars for their costs herein and have execution therefor.

July 15, 1938.

Motion of Appellants for Stay of Issuance of Mandate in Causes Nos. 11172 and 11182.)

Now comes Guaranty Trust Company of New York, as trustee under St. Louis Southwestern Railway Company First Terminal and Unifying Mortgage Dated January 1, 1912, appellant in the above entitled consolidated causes, and moves the Court to stay its mandate in the above entitled causes for sixty days in order to give appellant time within which to file a petition for a writ of certiorari in the Supreme Court of the United States.

Appellant states that Ralph M. Carson, of the firm of Davis, Polk, Wardwell, Gardiner & Reed, of the City of New York, conducted the trial in the District Court from which the above entitled consolidated appeals were taken, and with minor exceptions wrote the briefs filed by the appellant in this Court, and has at all times had the primary responsibility for the conduct of this litigation on behalf of the appellant, and excepts to prepare the petition for a writ of certiorari to be filed in the Supreme Court of the United States; that said Ralph M. Carson is now in Europe, having left for Europe several days before the decision of this Court in the above entitled consolidated appeals, and is not expected to return until the middle or latter part of the month August; that if this Court should grant only the period of

thirty days provided for in Rule 19 of the rules of this Court, there would not be sufficient time for the said Ralph M. Carson to prepare and file said petition within the said thirty day period; that the principal assistant of the said Ralph M. Carson in the said firm of Davis, Polk, Wardwell, Gardiner & Reed in connection with the preparation of the briefs filed by the appellant in the above entitled consolidated causes is likewise away from his office, and is not expected to return until about the middle or latter part of August, and that, therefore, it would not be practical to have preliminary work toward the preparation of said petition for a writ of certiorari performed before the return of said Ralph M. Carson.

Wherefore, appellant prays that, in lieu of the period of thirty days for stay of mandate provided in Rule 19 of the rules of this Court, this Court enter an order staying its mandate in the above entitled causes for a period of sixty days, in order to give appellant adequate time within which to file a petition for a writ of certiorari in the Supreme Court of the United States.

THOMPSON, MITCHELL,
THOMPSON & YOUNG,
GUY A. THOMPSON,
JOHN M. HOLMES,
Attorneys for Appellant.

261 (Endorsed): Filed in U. S. Circuit Court of Appeals,
Jul. 28, 1938.

(Order Staying Issuance of Mandate.)

May Term, 1938.

Monday, August 1, 1938.

On Consideration of the motion of Appellant for a stay of the mandate in these causes pending a petition to the Supreme Court of the United States for a writ of certiorari. It is now here ordered by this Court that the issuance of the mandate herein be, and the same is hereby, stayed for a period of sixty days from and after this date, and if within said period of sixty days there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari, record and brief have been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

August 1, 1938.

(Clerk's Certificate.)

United States Circuit Court of Appeals
Eighth Circuit.

I, E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the Eastern District of Missouri as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, and full, true and complete copies of the pleadings, record entries and proceedings, including the opinion, had and filed in the United States Circuit Court of Appeals, except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States in certain causes in said Circuit Court of Appeals wherein the Guaranty Trust Company of New York, as Trustee, etc., was Appellant and Berryman Henwood, Trustee, etc., et al., were Appellees, No. 11172, and wherein the Guaranty Trust Company of New York, as Trustee, etc., was Appellant and Berryman Henwood, Trustee, etc., et al., were Appellees, No. 11182, as full, true and complete as the originals of the same remain on file and of record in my office.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this ninth day of August, A. D. 1938.

E. E. KOCH,

(Seal)

Clerk of the United States Circuit
Court of Appeals for the Eighth
Circuit.

[fol. 263] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed November 7, 1938

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

No. 384

Office - Supreme Court, U. S.

FILED

SEP 27 1938

CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1938.

GUARANTY TRUST COMPANY OF NEW YORK, as
Trustee under St. Louis Southwestern Railway Company
First Terminal and Unifying Mortgage dated January
1, 1912, .

Petitioner,

against

BERRYMAN HENWOOD, Trustee of St. Louis Southwestern
Railway Company, Debtor, ST. LOUIS SOUTHWESTERN
RAILWAY COMPANY, and SOUTHERN
PACIFIC COMPANY.

PETITION FOR A WRIT OF CERTIORARI TO THE
CIRCUIT COURT OF APPEALS FOR THE EIGHTH
CIRCUIT AND BRIEF IN SUPPORT THEREOF.

JOHN W. DAVIS,

EDWIN S. S. SUNDERLAND,

RALPH M. CARSON,

Counsel for Petitioner.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1938.

GUARANTY TRUST COMPANY OF NEW YORK, as
Trustee under St. Louis. Southwestern
Railway Company First Terminal and
Unifying Mortgage dated January 1, 1912,
Petitioner,

against

BERRYMAN HENWOOD, Trustee of St. Louis
Southwestern Railway Company, Debtor,
ST. LOUIS SOUTHWESTERN RAILWAY COM-
PANY, and SOUTHERN PACIFIC COMPANY.

**PETITION FOR A WRIT OF CERTIORARI TO
THE CIRCUIT COURT OF APPEALS FOR
THE EIGHTH CIRCUIT.**

*To the Honorable the Chief Justice and the Associate Jus-
tices of the Supreme Court of the United States:*

Guaranty Trust Company of New York, a New York corporation, respectfully petitions for a writ of certiorari to review a final decision of the Circuit Court of Appeals for the Eighth Circuit, rendered in the above-entitled cause on July 15, 1938 and reported in 98 F. (2d) 160. This decision affirmed an order entered by the United States District Court for the Eastern District of Missouri, Eastern Division, on March 21, 1938 (unreported) denying in

part and allowing in part a claim against St. Louis Southwestern Railway Company, the Debtor in reorganization proceedings under Section 77 of the Bankruptcy Act.

Questions Presented.

1. Does the Joint Resolution of June 5, 1933 (48 Stat. 112), abrogating "gold clauses", annul a negotiable contract executed in 1912 by the Debtor wherein it agreed to pay to the holder of the instrument a stated number of Dutch guilders at Amsterdam, Holland?

2. Would the identical promise (otherwise valid) be void merely because of an unexercised and subsequently discarded option in the obligee to obtain, as an alternative to payment in guilders, payment in any one of four other specified currencies, one of these discarded alternative currencies having been gold coin of the United States of or equal to the standard of weight and fineness as it existed January 1, 1912?

3. In the case of a five-part alternative promise to be exercised at the election of the creditor, one of the alternatives being gold coin of the United States of specified weight and fineness, does the Joint Resolution of June 5, 1933, properly construed, abrogate the other alternatives and require the discharge of the entire contract upon the payment of the gold coin amount in legal tender dollars, contrary to the election of another currency by the creditor?

4. If so, is the Joint Resolution a constitutional exercise of the power of Congress?

Summary Statement of Matter Involved.

As of January 1, 1912 (R. 129), the First Terminal and Unifying Mortgage of the Debtor was authorized and executed. Under a general provision to such effect in the mortgage (R. 38), the form of coupon bond set forth in the mortgage (R. 19, 130) and issued thereunder was headed:

"No.

\$1,000.

U. S. Gold

£205 15s. 2d. Stg.

Marks 4200, D. R. W.

\$1,000.

U. S. Gold

2490 Guilders

5180 Francs"

and provided that the Debtor

"hereby promises to pay to the bearer, or, if registered, to the registered holder, of this bond, on the first day of January, 1952, at its office or agency in the Borough of Manhattan, City and State of New York, One thousand Dollars in gold coin of the United States of America, of or equal to the standard of weight and fineness as it existed January 1, 1912, or in London, England, £205 15s 2d, or in Amsterdam, Holland; 2,490 guilders, or in Berlin, Germany, marks 4200, D. R. W., or in Paris, France, 5180 francs, . . . Payment of the principal and interest of this bond will be made, *at the holder's option*, at the office or agency of the Railway Company in the Borough of Manhattan, in the City and State of New York, or *at designated offices in the foreign cities and countries above mentioned*" (R. 19).¹

The coupons for interest also contained multiple currency provisions substantially similar in form to those in

¹ Italics in this petition and brief ours; unless otherwise designated.

the bonds themselves (R. 22, 131). The 5636 bonds immediately involved here (R. 126) are all coupon bonds.

These bonds were issued in 1912 by the Debtor to an original group of American purchasers who paid dollars therefor and were resold to the public generally (R. 132-4). Before executing the mortgage, the Debtor made arrangements for the payment from time to time of the foreign exchange value of such guilders and other foreign currencies as might be demanded pursuant to the foreign currency alternatives (R. 172-3). The fact that such arrangements were made demonstrates that the Debtor had no thought of the guilder option as a gold clause in fact or in effect. Furthermore, the Debtor's president in his letter (summarized in the offering circular of the bonds) held forth to intending purchasers the multiple currency options (R. 133-4, 160). Clearly these options were advisedly inserted as an inducement to purchasers and were intended to be relied upon. The record does not show to what extent purchasers then and subsequently relied upon this inducement, but it does show that the Debtor received valuable and sufficient consideration for those bonds, of which the guilder option was an integral part, and that the bonds have been listed on the New York Stock Exchange since 1915 and have been actively traded in from that time on (R. 132-4).

On December 12, 1935, the Debtor filed its petition for reorganization under Section 77 of the Bankruptcy Act, and on the same day the Court approved the petition. On December 28, 1935, the District Court generally enjoined all persons, firms and corporations from bringing or continuing any suit against the Debtor or interfering with its property (R. 183). On January 1, 1936, the Debtor failed

to pay interest on the coupon bonds as well as other obligations (R. 159) which non-payment was made an event of default on April 1, 1936 by the First Terminal and Unifying Mortgage (R. 66).

Such default gave rise to broad powers in the petitioner as trustee under the mortgage (R. 69-71, 76), authorizing it to protect and enforce the rights of bondholders thereunder by suits in equity or at law, or by any other proper or legal remedies, and also to accelerate the maturity of the bonds. These broad powers necessarily included a corollary or ancillary right in the trustee to elect on behalf of the bondholders the most advantageous currency within the range of alternatives granted by the coupon bonds and the mortgage.

On April 11, 1936, an event of default having occurred on April 1, 1936, the Debtor applied for an injunction, enjoining the petitioner from accelerating the maturity of the outstanding First Terminal and Unifying bonds. The District Court issued the injunction on May 5, 1936 (R. 163); this order was reversed by the Circuit Court of Appeals for the Eighth Circuit on November 13, 1936 (*Guaranty Trust Company of New York v. Henwood*, 86 F. [2d] 347) and certiorari was denied by this Court on February 15, 1937, 300 U. S. 661. Immediately after the dissolution of the injunction, the petitioner served a notice of acceleration as of May 5, 1936, the date upon which the injunction was granted (R. 136).

Meanwhile, on June 4, 1936, the petitioner gave public notice to the effect that it intended within a short time to elect to receive payment in guilders, and to file a proof of claim on a guilder basis, in respect of all coupon bonds the holders of which had not previously acted in their own

behalf (R. 179).¹ Thereafter on September 24, 1936, the petitioner caused formal demand and protest to be made by a bailiff in Amsterdam, in accordance with the law of Holland (R. 169, 174), requiring the Debtor to pay immediately in guilders the principal and interest to it on behalf of all bondholders who had not previously made their own elections. This demand was not honored.² On the same day the petitioner verified and mailed its proof of claim on behalf of those bondholders who had not done so in their own behalf (R. 2-6).

After the dissolution of the injunction against acceleration and pursuant to leave of court (R. 163), petitioner verified a supplement to its proof of claim on March 12, 1937 (R. 104) with particular reference to the exchange value of the guilder. It was stipulated that the exchange value of the guilder was 67.78¢ on all the material dates: viz: December 12, 1935—when the Debtor filed its petition; May 5, 1936—when the acceleration of principal became effective; and September 24, 1936—when the demand for guilders and protest of non-payment were made in Amsterdam and when petitioner's proof of claim on a guilder basis was verified and mailed (R. 140).

¹ This notice, published in four American and three foreign newspapers, requested bondholders who did not desire an election to be made in guilders to notify the petitioner (R. 177). After the publication of the notice some bondholders specifically authorized the petitioner to elect guilders for them (Claimant's Exhibit 9, R. 180-3); a few bondholders filed individual proofs of claim electing dollars; while a more numerous class individually elected guilders or the dollar equivalent.

² The failure of the Debtor to maintain an office or agency in Amsterdam (R. 132) despite its agreement to make payment there, constituted a refusal which under well-settled authority rendered any demand unnecessary. *Sokoloff v. National City Bank*, 250 N. Y. 69.

The aggregate amount of principal thus claimed for the holders of 5,636 bonds by the petitioner was 14,033,640 Dutch guilders (2490 being the principal amount of guilders promised in each bond), and, by applying the stipulated rate of exchange of 67.78c, the aggregate dollar value of the claim for the principal amount due in guilders was \$3,512,001.19.

The District Court disallowed the guilder claim in its entirety and made no ruling whatsoever regarding the proper guilder exchange rate. Instead, the District Court allowed the claim to the extent of \$1,000 as principal for each bond, or \$5,636,000 for the 5,636 bonds, and interest on this sum at the rate of 5% per annum from July 1, 1935, to December 12, 1935 (R. 126). This allowance was less by \$3,876,001.19 than the dollar value of the aggregate amount of guilders claimed by the petitioner on account of principal, in accordance with the precise terms of the bonds, and correspondingly less than the amount claimed as interest.

The petitioner took two appeals from the order of the District Court; and, after consolidation of the appeals (R. 218) and argument thereon, the Circuit Court of Appeals for the Eighth Circuit, on July 15, 1938, affirmed the order of the District Court (R. 254-5, 98 F. [2d] 160).

The protestants raised other objections to petitioner's proof of claim than the one above discussed, but neither the District Court nor the Circuit Court of Appeals passed on such objections, the District Court finding that it was "unnecessary" to do so (R. 143).

Reasons Why a Writ of Certiorari Should Issue.

1. The Circuit Court of Appeals for the Eighth Circuit has decided an important question of Federal law in direct conflict with a previous decision of the United States Circuit Court of Appeals for the Second Circuit in *Anglo-Continental Treuhand, A. G. v. St. Louis Southwestern Railway Company*, 81 F. (2d) 11, cert. den. *sub. nom. Henwood, Trustee v. Anglo-Continental Treuhand, A. G.*, 298 U. S. 655.

In that case the Circuit Court of Appeals for the Second Circuit held, with a unanimous opinion written by Judge Learned Hand, that the very guarantor alternative in the bonds and coupons here involved was enforceable according to its terms and was beyond the reach of the Joint Resolution. That a direct conflict exists between the decision of the Second Circuit Court of Appeals in that case and the decision of the Eighth Circuit Court of Appeals in the instant case is beyond argument. The District Court, recognizing that its conclusions were wholly inconsistent with those of the Second Circuit Court of Appeals, as to which this Court had denied certiorari, attempted to justify its departure from the law established by that case, first, upon the theory that the law had been changed by the subsequent decision of this Court in *Holyoke Water Power Co. v. American Writing Paper Co.*, 300 U. S. 324, and second, in its own words, because "in any event this Court is not bound by the decision of said Circuit Court of Appeals in said case" (R. 143).

The Circuit Court of Appeals also recognized the direct conflict between its decision in the instant case and the previous decision of the Second Circuit in the *Anglo-Continental* case. In the opinion written by Judge Stone, the Court said (R. 248; 98 F. [2d] at p. 163):

"Appellant relies mainly upon *Anglo-Continentale Treuhand, A. G. v. St. Louis Southwestern Railway Co.*, 81 F. (2d) 11 (C. C. A. 2) and *McAdoo v. Southern Pac. Co.*, 10 Fed. Supp. 953 (D. C. N. D. Cal.). Each of those cases decided that the Resolution did not cover multiple currency provisions, such as here—the former case involving bonds of the same issue as before us."

The Court, refusing to follow these decisions, continued (R. 249; 98 F. [2d] at p. 163):

"We are fully conscious of the fine ability of the Judges who wrote and concurred in the opinions urged by appellant; and we are sensitive to the desirability of harmony in the decisions of the various Circuits. However, we are not permitted thus to relieve ourselves of the duty of examining and determining for ourselves the issues coming before us."

A comparison of the opinions in the *Anglo-Continentale* case and the *McAdoo* case, upholding the multiple currency options, with the opinion in the instant case, holding that such options are destroyed by the Joint Resolution of June 5, 1933, fails, we suggest, to disclose any reason which would justify the Court below in creating disharmony between the Circuits. Indeed, disharmony appeared among the judges of the Eighth Circuit Court themselves in consequence of the decision in this case.

In *Emery Bird Thayer Dry Goods Company v. Williams*, 98 F. (2d) 166, the Eighth Circuit Court of Appeals held that the Joint Resolution of June 5, 1933 did not reach a lease requiring the payment as yearly rental of a stated amount in gold coin of the United States of a specified standard of weight and fineness, or 557,280 "grains of pure,

unalloyed gold"; provided, however, that the lessors could at their option require the yearly payment of \$24,000 in lawful currency of the country. Two of the three judges were of the opinion that the lessee could not avoid the contractual duty of paying the grains of pure, unalloyed gold where the lessor refused to exercise his option to receive legal tender currency. Judge Woodrough, however, dissented for the reason, among others, that "... the decision in this case is directly contradictory to the opinion of this court in *Guaranty Trust Co. v. Berryman Henwood, Trustee*, 98 F. (2d) 160, just handed down" (98 F. [2d] at 178). This would seem to be obvious. If the Joint Resolution does not reach a contract to pay at designated places in the United States a specified number of grains of pure, unalloyed gold, it should follow, *a fortiori*, that the Resolution cannot touch a contract to pay a stated number of Dutch guilders in Amsterdam, Holland.¹

2. The Circuit Court of Appeals for the Eighth Circuit has decided an important question of Federal law which has not been, but should be, settled by this Court, and has decided it in a way probably in conflict with the applicable decisions of this Court.

The question involves the validity and scope of an important Federal statute. The importance of this question has been previously recognized by this Court in *Norman v. Baltimore & Ohio R. R.*, 294 U. S. 240, *Holyoke Water Power Co. v. American Writing Paper Co.*, 300 U. S. 324.

¹ On August 29, 1938, the Eighth Circuit Court of Appeals granted a petition for rehearing, set aside the decree entered pursuant to the opinion discussed, and set the case down for reargument on October 31, 1938.

335, and in other cases.¹ The Joint Resolution of June 5, 1933 (48 Stat. 112) if construed to nullify a promise to pay a specified amount of guilders at Amsterdam, Holland, would not be the same resolution that was upheld in the *Norman* and *Holyoke* cases as a proper exercise by Congress of its constitutional power over the coin and currency of the United States. The extraterritorial scope and the unreasonable application of the Resolution so as retroactively to destroy valid contracts—the construction given to the Joint Resolution by the Circuit Court of Appeals—raises grave doubts as to the validity of the Resolution when so applied.

The question presented in this case is also of the utmost importance, because of the prevalence of litigation within the country involving the identical issue, on the outcome of which large amounts of money depend. Although multiple currency contracts containing a gold clause were by no means as common as the straight gold clause, the fact that a particular form of covenant affected or claimed to be affected by the Joint Resolution was rare and exceptional has not deterred this Court from granting certiorari "because of the importance of the question". *Holyoke Power Co. v. Paper Co.*, 300 U. S. 324, 335.

The decisions in New York State alone on this important and essentially Federal question are in hopeless confusion. In May, 1935 the Appellate Division, First Department, an intermediate appellate court, held (by vote of three to one) in *City Bank Farmers Trust Company v. Bethlehem Steel Company*, 244 App. Div. 634, that the multiple currency clause in bonds issued by the Bethlehem Steel Company

¹ See also *Nortz v. United States*, 294 U. S. 317; *Perry v. United States*, 294 U. S. 330; *Smyth v. United States*, 302 U. S. 329.

was unenforceable in the hands of an American citizen. The exact basis of the opinion of the majority of the Court has since been the subject of much controversy in the lower courts of New York, largely because the majority opinion did not go so far as to hold that the multiple currency provision came within the language of the Resolution, but relied upon an unexpressed "legislative intent" and considerations of "good citizenship". Mr. Justice Merrill dissented vigorously, and in the next year the Court of Appeals of the Second Circuit in *Anglo-Continentale Treuhand, A.G. v. St. Louis Southwestern Railway Company*, 81 F. (2d) 11, accepted his reasoning and expressly repudiated the majority opinion in *City Bank Farmers Trust Co. v. Bethlehem Steel Co.* Many of the subsequent decisions in the New York State courts have been irreconcilable.¹ Indeed the justices of the Appellate Division, First Department, are still in disagreement. In the most recent case decided by that Court, *Zurich General Accident and Liability Insurance Company, Ltd. v. Bethlehem Steel Company*, 254 App. Div. 839 (June 17, 1938), three justices, constituting a majority, voted to follow the earlier *City Bank Farmers Trust Company* case, whereas the other two justices dissented "for

¹ See decision of Justice Valente in *Anglo-Continentale Treuhand, A.G. v. Southern Pacific Company*, 299 N. Y. Supp. 859, affirmed without opinion by the Appellate Division, First Department, 251 App. Div. 803; the decisions of Justice Hofstadter in *Zurich General Accident & Liability Insurance Co. Ltd. v. Bethlehem Iron & Steel Corporation*, and *Nederlandsche Middenstandsbank, N.V. etc. v. Bethlehem Steel Co.*, reported in the New York Law Journal, June 13, 1936 and *Anglo-Continentale Treuhand A.G. v. Bethlehem Steel Company*, 98 N. Y. L. J. 1164 October 15, 1937; modified, 6 N. Y. Supp. (2d) 334 (June 17, 1938) not yet officially reported, the decision of Justice Wasservogel in *Hydropress Handels A.G. etc. v. Lackawanna Steel Co., etc.*, 99 N. Y. L. J. 106, p. 2221, May 7, 1938; and the decision of Justice Rosenman in *Zurich General Accident & Liability Insurance Co. Ltd. v. Lackawanna Steel Co.*, 164 Misc. 498, aff'd sub nom. *Zurich General Accident and Liability Insurance Company, Ltd. v. Bethlehem Steel Company*, 254 App. Div. 839 (1937).

the reasons stated by Judge Hand in the opinion of the Circuit Court of Appeals, Second Circuit, in *Anglo-Continentale Treuhand, A.G. v. St. Louis Southwestern Ry. Co.*, 81 F. (2d) 11 (cert. den. *Henwood, Trustee v. Anglo-Continentale Treuhand, A.G.*, 298 U. S. 655).''

This important question of the scope and application of the Joint Resolution of June 5, 1933 with relation to multiple currency options has not been settled by this Court, although, as previously indicated, it was the only question involved in *Anglo-Continentale Treuhand, A. G. v. St. Louis Southwestern Railway Company* where certiorari was denied in 298 U. S. 655. The petitioner argued before the Circuit Court that the denial of certiorari in the *Anglo-Continentale* case, where this Court plainly had jurisdiction to review and, if so minded, alter the result of the decision of the Second Circuit, was significant and should be given weight, even though it did not, of course, amount to a technical affirmance of the decision below.¹ The Circuit Court, however, gave it no weight whatsoever, saying:

''The argument of appellant that the denial of certiorari by the Supreme Court in the former (*Anglo-Continentale*) case should be given weight in the construction of the statute cannot be allowed''

The Circuit Court also ignored the construction given to the Joint Resolution in *Holyoke Water Power Co. v. American Writing Paper Co.*, 300 U. S. 324, with respect to contracts providing for alternative methods of payment, but, instead, cited that case for the proposition that speculation as to the ''evil to be remedied'' was permissible in the absence of any Congressional language including the

guilder alternative within the evils against which the Joint Resolution was aimed.

3. The decision of the Circuit Court of Appeals affirming the disallowance of the guilder claim by the District Court departed so far from the accepted and usual course of judicial proceedings in bankruptcy as to call for an exercise of this Court's power of supervision.

The procedure of both courts below in scaling down the claim of the petitioner, as trustee, on these bonds, from the dollar value of the guilders which were elected to the dollar alternative in the bonds which was never elected and never became an enforceable contract, was an arbitrary deprivation of the rights of the bondholders represented by the petitioner. Virtually the only justification for such procedure attempted in the opinion of the Circuit Court of Appeals is that the Court was of the opinion that the contract claim in guilders or guilder value would entitle the First Terminal and Unifying bondholders to a larger participation in the reorganization than they would have had had they sought to enforce the dollar alternative in lieu thereof. This is, of course, beside the point. A court in reorganization proceedings has never had and should not have power or authority to compel any creditor to rely on his least remunerative contract; or to substitute for an executed and binding contract, a hypothetical agreement that never became legally operative.

Prayer.

For the foregoing reasons, which are developed in some detail in the accompanying brief, your petitioner prays that a writ of certiorari issue out of this Court to the

United States Circuit Court of Appeals for the Eighth Circuit commanding said Court to certify and send to this Court on a day to be determined, a full and complete transcript of the record of all of the proceedings of such Circuit Court of Appeals had in this cause, to the end that this cause may be reviewed and determined by this Court; that the final order and decree of the Circuit Court of Appeals be reversed; and that the petitioner be granted such other and further relief as is proper.

New York, N. Y., September 26, 1938.

GUARANTY TRUST COMPANY OF NEW YORK,

By JOHN W. DAVIS,
EDWIN S. S. SUNDERLAND,
RALPH M. CARSON,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION.

Opinions Below.

The United States District Court for the Eastern District of Missouri, Eastern Division, wrote no opinion, but it made findings of fact and conclusions of law (R. 127-143). The opinion of the United States Circuit Court of Appeals for the Eighth Circuit (R. 246-254) is reported in 98 F. (2d) 160, the Advance Sheets for September 12, 1938.

Jurisdiction.

The decree of the Circuit Court of Appeals for the Eighth Circuit was entered July 15, 1938 (R. 254-5). The jurisdiction of this Court is invoked under the provisions of Section 240(a) of the Judicial Code, as amended by the Act of February, 13, 1925, 43 Stat. 938.

Statement of the Case.

A summary statement of the facts is given in the petition, pages 3-7 above.

Statutes Involved.

The Joint Resolution of June 5, 1933 (48 Stat. 112, Public Resolution No. 10, 73d Congress), in so far as material to this cause, provides as follows:

Whereas the holding of or dealing in gold affect the public interest, and are therefore subject to proper regulation and restriction; and

Whereas the existing emergency has disclosed that provisions of obligations which purport to give the obligee a right to require payment in gold or a particular kind of coin or currency of the United States, or in an amount in money of the United States measured thereby, obstruct the power of the Congress to regulate the value of the money of the United States, and are inconsistent with the declared policy of the Congress to maintain at all times the equal power of every dollar, coined or issued by the United States, in the markets and in the payment of debts: Now, therefore, be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) every provision contained in or made with respect to any obligation which purports to give the obligee a right to require payment in gold or a particular kind of coin or currency, or in an amount in money of the United States measured thereby, is declared to be against public policy; and no such provision shall be contained in or made with respect to any obligation hereafter incurred. Every obligation, heretofore or hereafter incurred, whether or not any such provision is contained therein or made with respect thereto, shall be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts. Any such provision contained in any law authorizing obligations to be issued by or under authority of the United States, is hereby repealed, but the repeal of any such provision shall not invalidate any other provision or authority contained in such law.

(b) As used in this resolution, the term "obligation" means an obligation (including every obligation of and to the United States, excepting currency payable in money of the United States; and the term "coin or currency" means coin or currency of the United States, including Federal Reserve notes and circulating notes of Federal Reserve banks and national banking associations.

Specification of Errors to Be Urged.

All the errors assigned in the Court below are intended here to be urged (R. 210-18). These may be grouped as follows:

1. Failing to find and conclude as a matter of law that the power of electing between the alternative currencies stated in the bonds could be exercised only by or on behalf of the bondholders, and not by Congress or the Court on behalf of the Debtor or other creditors; that the demand for payment of guilders was duly made on September 24, 1936 by the petitioner on behalf of the bondholders; and that thereupon the bonds became straight and independent contracts to pay a specified number of guilders in Holland.

2. Holding and concluding that the guilder alternative in these bonds falls within the language and the policy of the Joint Resolution of June 5, 1933, and is thereby rendered null and void.

3. Scaling down the claim of the petitioner, as trustee, by refusing to enforce the straight contract for guilders and substituting therefor a claim based upon the dollar.

alternative in the bonds which alternative was never elected, never became operative, and was not even sought to be enforced. This involves the failure of the courts below to determine as a matter of law that the objections contained in the protests against the proof of claim of the petitioner, as trustee (R. 106, 112, 113, 120-22) were without merit (R. 246-54, 143).

Summary of Argument.

I.

The present claim is based upon a straight contract for the payment of Dutch guilders in Holland, and the validity of this contract is in no way affected by the discarded and unexercised gold coin alternative stated in these bonds.

II.

The Joint Resolution of June 5, 1933 does not affect the contract of the Debtor in these bonds to pay a definite sum of Dutch guilders in Holland.

III.

The sole purpose of the Joint Resolution was to nullify gold clauses, and there was no intent or purpose whatsoever on the part of Congress to interfere with obligations payable in foreign currencies.

IV.

The construction of the Joint Resolution so as to reach contracts for the payment of Dutch guilders in Holland would make it unconstitutional.

ARGUMENT.

I.

The present claim is based upon a straight contract for the payment of Dutch guilders in Holland, and the validity of this contract is in no way affected by the discarded and unexercised gold coin alternative stated in these bonds.

These coupon bonds contained five mutually exclusive alternative promises at the time when they were first issued. One of these alternatives was a promise to pay \$1,000 in gold coin of the United States of the standard of weight and fineness as it existed January 1, 1912. This alternative, however, was nullified in 1933 by the Joint Resolution, even if it had not been rendered impossible of performance by prior monetary legislation. *Emery Bird Thayer Dry Goods Co. v. Williams* (C. C. A. 8th, July 15, 1938), 98 F. (2d) 166. Thereafter the bonds contained only the remaining alternative promises to pay guilders, pounds, marks or francs, "at the holder's option"; and each bondholder also had a statutory option, based upon the Joint Resolution, to recover "dollar for dollar" in legal tender for every gold coin dollar originally promised in the gold coin alternative. At a still later date, in September, 1936, at the election of guilders by the petitioner, as trustee, on behalf of the bondholders, the statutory option for legal tender dollars and every alternative, except the guilder promise, was necessarily discarded; the bonds in question thereupon became straight contracts to pay guilders in Holland. *Anglo-Continentale Treuhand, A.G. v. St. Louis Southwestern Ry. Co.*, 81 F. (2d) 11. See *Yankton Sioux Tribe of*

Indians v. U. S., 272 U. S. 351, 358 (1926); *Twaits v. Pennsylvania R. Co.*, 77 N. J. Eq. 103, 110, 75 A. 1010, 1013 (1910); Restatement, Contracts, §§325 (2), 344. Comment (b) and 469; 5 Williston on Contracts (Rev. Ed. 1936), sec. 1407, page 3920. In the first passage cited from the Restatement on Contracts it is said:

"When an alternative contract has ceased to be alternative by reason of an election by the party having the option . . . a breach as to the one remaining alternative may occur in the same way as if the contract had originally provided for only that performance."

The present claim is simply a claim for damages for breach of contract to pay guilders. Whether or not there had once been an alternative promise to pay United States gold, or any other currency, has now become wholly immaterial. There has been no attempt to enforce the previously existing gold coin alternative. That alternative has been virtually stricken from the bonds, if not by the Joint Resolution itself, by the election of guilders and the consequent renunciation of any right to take gold.

Both courts below assumed that the guilder election was valid, but held that the Joint Resolution rendered the election ineffective. In so holding, they overlooked the fact that, because of the guilder election, the gold coin, and all other alternatives, had been irrevocably stricken from the bonds. This oversight was the fundamental error underlying both decisions below.

II.

The Joint Resolution of June 5, 1933, does not affect the contract of the Debtor in these bonds to pay a definite sum of Dutch guilders in Holland.

We submit that even a cursory reading of the Joint Resolution as a whole leaves no room for argument on this point. On its face the Resolution has nothing whatever to do with contracts calling for the payment of foreign money. The title, the preamble, the operative provisions of the Resolution, and the very definitions contained in the Resolution, leave no room for doubt; they strictly confine the statute to coins, currencies or money of the United States. "The United States" stand out as words of limitation in substantially every clause, from the title down to the definitions. When we come to the definitions we find that "the United States" are to be inserted in the text as words of limitation in those few clauses where they do not at first appear. Congress, in its manifest determination to exclude everything but coin, currency or money of the United States from the reach of the Resolution, expressly declares that:

"(b) As used in this resolution, the term 'obligation' means an obligation (including every obligation of and to the United States, excepting currency) payable in money of the United States; and the term 'coin or currency' means coin or currency of the United States, including Federal Reserve notes and circulating notes of Federal Reserve banks and national banking associations."

Despite such extreme care in draftsmanship, the Circuit Court of Appeals for the Eighth Circuit held that the Resolution was ambiguous in so far as the present obligations,

payable in Dutch guilders, were concerned, saying (R. 249, 98.F. [2d] at 163):

"In this instance, we are unable to conclude that the Resolution is, as to the matter here, unambiguous. The crucial word 'payable' is, standing alone, not confinable to one single definite meaning."

Because it was in doubt as to whether or not the words "obligation payable in money of the United States", as used in the Joint Resolution, covered the present contract to pay guilders in Holland, the Court below found, in some manner beyond our comprehension, sufficient cause for summarily dismissing those previous decisions in other Circuits (*Anglo-Continentale Treuhand, A. G. v. St. Louis Southwestern Railway Company* [C. C. 2d, 1936], 81 F. [2d] 11, cert. den. 298 U. S. 655; *McAdoo v. Southern Pacific Company*, 10 F. Supp. 953 [N. D. Cal., 1935]), that had held the Resolution plainly inapplicable to foreign money alternatives. Having thus disposed of the applicable precedents, the Circuit Court of Appeals went on to hold that the guilder promise in these bonds constituted "an obligation payable in money of the United States" and was therefore rendered void by the Joint Resolution.

We shall not undertake a detailed analysis of the process of reasoning by which the Court below achieved such an astonishing result. The very result discloses that the steps in the reasoning were themselves erroneous.

In substance, the Circuit Court of Appeals seized upon the fact that as of January 1, 1912, the date of the issuance of the bonds, the five alternative currencies stated in the bonds were temporarily equivalent. It was solely because of this conceded equivalence of the alternatives on that par-

ticular date, some twenty-six years ago, that the court found any reason for including the guilder alternative within the prohibition of the Joint Resolution. In this connection the Court said (R. 252, 98 F. [2d] at 165):

"The amount of guilders, pounds, francs or marks which might be elected by the obligee was, admittedly, determined by the value of the gold dollar as of January 1, 1912."

After expounding the fact that the guilder alternative had subsequently become more valuable than the dollar alternative and after assuming that the election of guilders by the obligee would consequently give that obligee an "advantage not warranted by the dollar value of their obligations", the Court continued:

"The provision may or may not have had an entirely proper business purpose of making the bonds attractive to investors in Holland, England, France and Germany by providing for payment in the money of such countries within those countries. But it is the effect and not the purpose which is important. The effect is to freeze the unit of payment as of the gold dollar of the weight and fineness of January 1, 1912."

The Court again digressed upon the "advantage" or "premium" that, by its assumption, accompanied the guilder alternative in the bonds and said (R. 253-4, 98 F. [2d] at 166):

"In short, the evil sought to be avoided by the Resolution is accomplished by a form of indirection and, to that extent, the purposes of the Resolution and, therefore, the Resolution itself defeated. We think such a result brings these instruments within

the intendment of the Resolution and within the ambiguous expressions, set out hereinabove, of the Resolution. The vice of these instruments, in the view of the Resolution, is that they provide for payment in gold dollars of a specified weight and fineness or, optionally with the holders, in foreign currencies, the amount or value of which is based upon that gold dollar."

The complete answer to this entire line of argument is found in the decision of the Circuit Court of Appeals for the Second Circuit in the *Anglo-Continentale* case, in which Judge Learned Hand pointed out that the gold question was not involved where the obligee had elected guilders, saying (81 F. [2d] 11):

"As has been seen, the coupons contained alternative promises; the holder might demand gold dollars, pounds, guilders, marks or francs at his choice. If he chose any of the foreign currencies he could not get gold; he must be content with whatever the money of the country might be on the due date; it might then be exchangeable for all sorts of things, gold, silver, copper, land, coffee; it might be 'inconvertible', not exchangeable for anything at all. When for example France and Germany and England went off the gold standard the defendant was relieved *pro tanto*, as it will be if Holland should similarly go off; it is therefore of no significance that she happens not to have done so in 1934 and 1935. If this were not plain enough from the absence from the promise of any requirement to pay gold, the contrast between foreign currencies and 'dollars in gold' would put it beyond doubt."

That in 1912, when the bonds were issued, the respective amounts of the alternative currencies were based upon the

gold dollar of that date is wholly immaterial. In fact there was no difference in value at that time between the gold dollar and the paper dollar. Since 1912 and since the passage of the Joint Resolution, there has been no necessary or actual equivalence in value between the dollar of 1912 gold or otherwise, and the other alternative currencies stated in the bonds. From 1912 to the present time the five alternative currencies stated in the bonds have actually fluctuated in value with relation to each other, and these five alternatives were not mutually equivalent in 1933, when the Joint Resolution became law, or at any time subsequent thereto. Thus the Court below was clearly in error when it found that the effect of the guilder option in these instruments "... is to freeze the unit of payment as of the gold dollar ...".

Furthermore, the Court was unjustified in holding that "the evil sought to be avoided by the Resolution is accomplished by a form of indirection and, to that extent, the purposes of the Resolution and, therefore, the Resolution itself defeated." There could have been no attempt to evade the purpose of the Resolution or to defeat the Resolution itself when the guilder alternatives were placed in these instruments some twenty years before the Resolution became law. After the Resolution became law the election of guilders pursuant to the terms of the instruments was merely the exercise of a valid and innocent contract right previously granted for valuable consideration. It is utterly fanciful, therefore, to regard the granting and exercise of this particular contractual option as an attempt to evade, by a form of indirection or otherwise, the purpose of the Resolution.

Stripped of the erroneous assumptions (1) that the guilder alternative is the equivalent of a promise to pay

old and (2) that it was inserted in the bonds for the purpose of evading the Joint Resolution, no reason can be found in the opinion of the Eighth Circuit Court of Appeals justifying or even permitting the inclusion of the guilder alternative within the condemnation of the Joint Resolution. Indeed, there appear to be overwhelming reasons for concluding that the Joint Resolution was never intended to cover a promise to pay guilders, such as that found in these instruments.

III.

The sole purpose of the Joint Resolution was to nullify gold clauses, and there was no intent or purpose whatsoever on the part of Congress to interfere with obligations payable in foreign currencies.

The Joint Resolution itself, as we have seen, contains no hint of an intent on the part of Congress to interfere with obligations payable in foreign currencies. Nor can any such purpose be found in the Committee Reports or in the Congressional debates with reference to the Joint Resolution. Neither of the courts below could find any declaration of such a purpose on the part of Congress, either in the Joint Resolution, or in the debates or Committee Reports in Congress. Both the Resolution itself and its legislative history disclose that the sole purpose of the Joint Resolution was to nullify gold clauses. Thus the Eighth Circuit Court of Appeals summarized the purpose of the Resolution as follows (R. 251, 98 F. [2d] at 164):

"In short, the evil struck at by the Resolution was contract provisions purporting 'to give the obligee a right to require payment in gold or a par-

ticular kind of coin or currency [of the United States] or in an amount in money of the United States measured thereby—as defined in paragraph (b), ‘payable in money of the United States,’ 31 U. S. C. A. §463. The reason why this is an evil and the reason for preventing it being to prevent obstruction of the maintenance of the equal value of the various United States monies ‘in the markets and in the payment of debts.’ ”

This limited purpose is made even more clear when the Joint Resolution is considered in connection with other monetary measures contemporaneously enacted by Congress. See *Norman v. Baltimore & Ohio R. Co.*, 294 U. S. 240, 295-7 where the series of measures relating to the currency, of which the Joint Resolution was but a part, are summarized by this Court. It is apparent from this summary, and indeed from the entire opinion of the Court, that the shortage of gold in 1933 created the necessity that called the Joint Resolution into being.

That the dislocation in the domestic economy caused by the shortage of gold was the sole cause for the passage of the Joint Resolution is further shown by the statements of Representative Steagall, Chairman of the Committee on Banking and Currency, who sponsored the Resolution in the House. He summarized the Resolution as follows (77 Cong. Rec. at p. 4528):

“This resolution declares that contracts requiring the discharge of obligations solely by payments in gold are contrary to public policy; that hereafter no such contracts may be made and that all such contracts now in existence or that may hereafter exist shall be payable in lawful money of the United States.”

He subsequently said (at p. 4529):

"If the gold clause applied to a very limited number of contracts and security issues, it would be a matter of no particular consequence; but in this country virtually all obligations, almost as a matter of routine, contain the gold clause."

Multiple currency clauses, unlike gold clauses, applied to a very limited number of contracts and security issues in the year 1933. While the gold clause has been estimated to have been in contracts for seventy-five billions of dollars or more (see *Norman v. Baltimore & Ohio R. Co.*, 294 U. S. 240, 313), foreign currency options do not amount to 1% of this sum. See Nussbaum, Multiple Currency and Index Clauses, 84 U. of Pa. Law Rev. 569, 575-6 (March, 1936).¹

There are other fundamental distinctions between gold clauses and multiple currency clauses that would explain why Congress should nullify gold clauses, while sanctioning or ignoring multiple currency clauses. See Prof. Nussbaum's article, cited. At pages 576-7 of this article, the author makes a thorough analysis of the economic, social and political differences between multiple currency clauses and gold clauses, pointing out, among other things, that multiple currency obligations have always been undertaken with a clear understanding of their meaning. This observation is particularly applicable to the present case where the record shows that before execution of the First Terminal

¹ According to the computation of the Debtor's Trustee, at p. 6, in his unsuccessful petition for certiorari in *Henwood, Trustee v. Anglo-Continental Treuhand, A.G.*, 298 U. S. 655, only \$90,000,000 face amount of outstanding bonds have alternative provisions for payment in moneys of countries remaining on the pre-war gold standard. This is a little more than 1/10 of 1% of the aggregate of bonds containing the gold clause.

and Unifying Mortgage the Debtor made arrangements with the petitioner, contemplating payment of "a fair current rate" for the guilders, should the bondholders demand them (R. 172).

The provisions of the Joint Resolution are explicit and its purpose is clear. The only argument for including multiple currency clauses within its provisions requires the divorce of a single sentence in the Resolution from its context in complete disregard of the obvious purpose of the statute as a whole. This sentence, upon which the court below placed so much emphasis, is the second sentence in paragraph (a). With the applicable statutory definitions inserted in brackets, this sentence reads:

"Every obligation [payable in money of the United States], heretofore or hereafter incurred, whether or not any such [i. e., gold clause] provision is contained therein or made with respect thereto, shall be discharged upon payment, dollar for dollar, in any coin or currency [of the United States] which at the time of payment is legal tender for public and private debts."

The respondents have seriously contended that the bonds in question are obligations payable in money of the United States because one of the five alternative methods of payment, *prior to the election of guilders*, was in gold coin of the United States, and that consequently the Resolution *requires* that these instruments "shall be discharged upon payment dollar for dollar" in legal tender. Inasmuch as the foreign money alternatives cannot possibly be discharged "dollar for dollar", the contention is that they have been nullified by implication. This ingenious construction of the Resolution is obviously unsound. It ignores the

commercial meaning of the word "payable" as that which must be paid. *Ingram v. Mandler*, 56 F. (2d) 994, 997 (C. C. A. 10th, 1932); Note, (1935) 49 Harv. L. Rev. 152, 153. It ignores the fact that the bonds could not be paid in money of the United States prior to an election of that medium of payment on the part of the bondholder. It ignores the fact that no obligation of the Debtor payable in money of the United States was ever "incurred"; as the very language of the Resolution requires, because no election to receive money of the United States in payment had ever been made. It ignores the fact that the sole surviving obligation or duty "incurred" by the Debtor, viz.—to pay guilders, cannot possibly be discharged upon payment "dollar for dollar". It therefore assumes that the word "obligation" means the instrument evidencing the debt and not the debt itself. It further assumes that the clause "whether or not any such provision is contained therein or made with respect thereto" is without significance and only means that it is immaterial whether or not the instrument contains a gold clause provision. This Court, on the other hand, has previously construed this clause to mean "irrespective of any provision contained therein whereby the obligee was given a right to require payment in gold" or "though it contains such provisions". See *Holyoke Water Power Co. v. American Writing Paper Co.*, 300 U. S. 324, 334, 339. In short, the Resolution is construed as providing that every instrument that might possibly have been paid in money of the United States at any time shall now be fully discharged upon the payment of legal tender dollars "dollar for dollar".

So construed, the Resolution has nothing to do with gold clauses, but destroys every promise, provision or clause in any instrument that might possibly be paid in

dollars, and requires that the dollar promise shall be paid in legal tender dollars. In other words, a written instrument giving the obligee the right to claim \$5 or a horse, at his option, "shall be discharged" upon the payment of \$5 in legal tender. It is thus immaterial whether the alternative promise that is destroyed is against public policy or not; as long as it is not a dollar promise it would be completely destroyed by this construction of the Joint Resolution. Accordingly, the preamble to the Joint Resolution and the first sentence in paragraph (a) declaring gold clauses illegal and against public policy have been reduced to mere surplusage. By this construction the Joint Resolution is not a monetary regulation at all, is not directed against gold clauses, but is merely an attempt by Congress, for no apparent reason, to eliminate alternative contracts wherever one of the alternatives permits the payment of United States money.

The contended construction is, we submit, untenable. And in another case, decided on the same day, the Eighth Circuit so held. *Emery Bird Thayer Dry Goods Company v. Williams* (C. C. A. 8, July 13, 1938), 98 F. (2d) 166. The entire purpose and effect of the Joint Resolution has been summarized by this Court in *Holyoke Water Power Co. v. American Writing Paper Co.*, 300 U. S. at 338-9, as follows:

"The Resolution touches gold as well as coin or currency [of the United States] whenever transactions in either are within the evil to be remedied. We learn from the preamble that 'provisions of obligations which purport to give the obligee a right to require payment in gold or a particular kind of coin or currency of the United States, or in an amount in money of the United States measured

thereby, obstruct the power of the Congress to regulate the value of the money of the United States, and are inconsistent with the declared policy of the Congress to maintain at all times the equal power of every dollar, coined or issued by the United States, in the markets and in the payment of debts. Accordingly, all such provisions are declared to be against public policy, and every obligation, heretofore, or hereafter incurred, though it contain such provisions, shall be payable, dollar for dollar, in legal tender at the time of payment."

It is apparent from the foregoing that the Resolution does not touch a contract to pay foreign money in a foreign country; that it touches only gold and money of the United States, whenever transactions in either obstruct the power of Congress over money of the United States.

IV.

The construction of the Joint Resolution so as to reach contracts for the payment of Dutch guilders in Holland makes it unconstitutional.

The Joint Resolution has been held to be a constitutional exercise by Congress of its power over the currency of the United States only in so far as it applies to gold clauses in obligations payable in this country in money of the United States. *Norman v. Baltimore & Ohio R. Co.*, 294 U. S. 240; *Perry v. U. S.*, 294 U. S. 330; *Holyoke Water Power Co. v. American Writing Paper Co.*, 300 U. S. 324; *Smyth v. U. S.*, 302 U. S. 329. The reasonableness of the Resolution in removing the gold clause as a burden on and interference with the monetary power of Congress is fully expounded in the

Norman case. The reasons there given, however, would be inapplicable to the nullification of multiple currency clauses.

The Joint Resolution, as construed by the courts below, so as to apply to multiple currency clauses, as well as gold clauses, becomes not a monetary regulation but a mere repudiation statute, and hence unconstitutional. *Louisville Joint Stock Land Bank v. Ralston*, 295 U. S. 555, 602. Furthermore, it is highly doubtful whether Congress could legislate as to extra-territorial matters, such as the obligation of the Debtor here to pay guilders in Amsterdam. See *Sandberg v. McDonald*, 248 U. S. 185, 195; *American Banana Co. v. United Fruit Co.*, 213 U. S. 347.

We submit that the construction of the Joint Resolution by the courts below, raising so many grave doubts as to its constitutionality, can not be accepted. See *National Labor Relations Board v. Jones & Laughlin Steel Corporation*, 301 U. S. 1, 30.

Conclusion.

This cause involves Federal questions of first importance which should be reviewed and settled by this Court and a writ of certiorari should issue for that purpose, as prayed in the foregoing petition.

Respectfully submitted,

JOHN W. DAVIS,
EDWIN S. S. SUNDERLAND,
RALPH M. CARSON,
Counsel for Petitioner.

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CHARLES E. CARSON

IN THE

Supreme Court of the United States

OCTOBER TERM, 1938.

No. 384

GUARANTY TRUST COMPANY OF NEW YORK, as Trustee
under St. Louis Southwestern Railway Company First Terminal
and Unifying Mortgage dated January 1, 1912,

Petitioner,

against

BERRYMAN HENWOOD, Trustee of St. Louis Southwestern
Railway Company, Debtor, ST. LOUIS SOUTHWESTERN
RAILWAY COMPANY, and SOUTHERN PACIFIC COM-
PANY,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR THE PETITIONER

JOHN W. DAVIS,
RALPH M. CARSON,

Counsel for the Petitioner.

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Of Counsel.

January 14, 1939.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1938.

GUARANTY TRUST COMPANY OF NEW YORK,
as Trustee under S. L. Southwestern
Railway Company First Terminal and Uni-
fying Mortgage dated January 1, 1912,

Petitioner,

against

FERRYMAN HENWOOD, Trustee of St. Louis
Southwestern Railway Company, Debtor,
ST. LOUIS SOUTHWESTERN RAILWAY COM-
PANY, and SOUTHERN PACIFIC COMPANY,

Respondents.

No. 384

WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The District Court for the Eastern District of Missouri,
Eastern Division, wrote no opinion, but made findings of
fact and conclusions of law (R. 127-143). The opinion of
the Circuit Court of Appeals for the Eighth Circuit (R.
46-254) is reported in 98 F. (2d) 160.

JURISDICTION

The decree of the Circuit Court of Appeals for the Eighth Circuit was entered July 15, 1938 (R. 254-5). The petition for a writ of certiorari was filed on September 27, 1938, and was granted on November 7, 1938, U. S. (R. 258). The jurisdiction of this Court rests upon the provisions of Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 938.

QUESTIONS PRESENTED

The petitioner, acting as trustee for the holders of 5,636 bonds of the St. Louis Southwestern Railway Company, the Debtor in reorganization proceedings under Bankruptcy Act § 77, filed proof of claim on behalf of the bondholders for the stated number of Dutch guilders which the Debtor promised to pay as principal and interest in each of the 5,636 bonds and applicable coupons. Unsuccessful demand, and protest for non-payment, of the bonds and coupons in guilders had been formally made in Amsterdam, Holland, in accordance with Dutch law (R. 137, 169, 174). Both courts below disallowed the petitioner's claim for guilders on account of principal and interest on the sole ground that it was barred and rendered unenforceable by the Joint Resolution of Congress of June 5, 1933, 48 Stat. 112, popularly known as the "Gold Clause Resolution". Although other objections to the guilder claim had been raised by the respondents, neither of the courts below passed on them, the District Court stating that it was "unnecessary" to do so (R. 143). Thus the only questions presented

for review by this Court are those raised in the petition for certiorari and determined adversely below, namely:

1. Does the Joint Resolution of June 5, 1933, 48 Stat. 112, abrogating "gold clauses", annul a negotiable contract executed in 1912 by the Debtor wherein it agreed to pay to the holder of the instrument a stated number of Dutch guilders at Amsterdam, Holland?

2. Would the identical promise (otherwise valid) be void merely because of an unexercised and subsequently discarded option in the obligee to obtain, as an alternative to payment in guilders, payment in any one of four other specified currencies, one of these discarded alternative currencies having been gold coin of the United States of or equal to the standard of weight and fineness as it existed January 1, 1912?

3. In the case of a five-part alternative promise to be exercised at the election of the creditor, one of the alternatives being gold coin of the United States of specified weight and fineness, does the Joint Resolution of June 5, 1933, properly construed, abrogate the other alternatives and require the discharge of the entire contract upon the payment of the gold coin amount in legal tender dollars, contrary to the election of the creditor?

4. If so, is the Joint Resolution a constitutional exercise of the power of Congress?

These were the questions stated in petitioner's application for certiorari (p. 2), as being the only questions which

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it was believed this Court would desire to consider in view of the fact that the decisions below adverse to the petitioner were predicated exclusively upon the Joint Resolution *Guaranty Trust Company of New York v. U. S.*, 304 U. S. 126, 144.

STATUTE INVOLVED

THE JOINT RESOLUTION OF JUNE 5, 1933

[48 Stat. 112, Public Resolution—No. 10—73d Congress
H. J. Res. 192]

"JOINT RESOLUTION

To assure uniform value to the coins and currencies of the United States.

Whereas the holding of, or dealing in gold affects the public interest, and are therefore subject to proper regulation and restriction; and

Whereas the existing emergency has disclosed that provisions of obligations which purport to give the obligee a right to require payment in gold or a particular kind of coin or currency of the United States, or in an amount in money of the United States measured thereby, obstruct the power of the Congress to regulate the value of the money of the United States, and are inconsistent with the declared policy of the Congress to maintain at all times the equal power of every dollar, coined or issued by the United States, in the markets and in the payment of debts. Now, therefore, be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) every provision contained in

made with respect to any obligation which purports to give the obligee a right to require payment in gold or a particular kind of coin or currency, or in an amount in money of the United States measured thereby, is declared to be against public policy; and no such provision shall be contained in or made with respect to any obligation hereafter incurred. Every obligation, heretofore or hereafter incurred, whether or not any such provision is contained therein or made with respect thereto, shall be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts. Any such provision contained in any law authorizing obligations to be issued by or under authority of the United States, is hereby repealed, but the repeal of any such provision shall not invalidate any other provision or authority contained in such law.

(b) As used in this resolution, the term 'obligation' means an obligation (including every obligation of and to the United States, excepting currency) payable in money of the United States; and the term 'coin or currency' means coin or currency of the United States, including Federal Reserve notes and circulating notes of Federal Reserve banks and national banking associations.

SEC. 2. The last sentence of paragraph (1) of subsection (b) of section 43 of the Act entitled 'An Act to relieve the existing national economic emergency by increasing agricultural purchasing power, to raise revenue for extraordinary expenses incurred by reason of such emergency, to provide emergency relief with respect to agricultural indebtedness, to provide for the orderly liquidation of joint-stock land banks, and for other purposes,' approved May 12, 1933, is amended to read as follows:

'All coins and currencies of the United States (including Federal Reserve notes and circulating notes of Federal Reserve banks and national banking associations) heretofore or hereafter coined or issued, shall be legal tender for all debts, public and private, public charges, taxes, duties, and dues, except that gold coins, when below the standard weight and limit of tolerance provided by law for the single piece, shall be legal tender only at valuation in proportion to their actual weight.'

Approved, June 5, 1933, 4.40 p.m."

STATEMENT OF THE CASE

Shortly before April 24, 1912, St. Louis Southwestern Railway Company (referred to herein as the Debtor), a Missouri corporation, authorized an issue of bonds to be known as its First Terminal and Unifying Mortgage Bonds, and to be secured by a corporate mortgage on its property. Guaranty Trust Company of New York, a New York corporation, and an individual became trustees under the mortgage. The mortgage, dated January 1, 1912, contemplated the issuance of a limited amount of bonds, which might be either coupon bonds with provision for registration as to principal or registered bonds without coupons. The 5,636 bonds immediately involved here (R. 120) are all coupon bonds. Under a general provision to such effect in the mortgage (R. 38-9) the form of coupon bond set forth in the Mortgage Indenture (R. 19, 130) and issued thereunder, was headed:

"No. _____

\$1,000.
U. S. Gold
£205 15s. 2d. Stg.
Marks 4200, D.R.W.

\$1,000.
U. S. Gold
2490 Guilders
5180 Francs

and provided that the Debtor

hereby promises to pay to the bearer, or, if registered, to the registered holder, of this bond, on the first day of January, 1952, at its office or agency in the Borough of Manhattan, City and State of New York, One Thousand Dollars in gold coin of the United States of America, of or equal to the standard of weight and fineness as it existed January 1, 1912, or in London, England, £205 15s 2d, *or, in Amsterdam, Holland, 2,490 guilders*, or in Berlin, Germany, marks 4200, D.R.W., or in Paris, France, 5180 francs, Payment of the principal and interest of this bond will be made, *at the holder's option*, at the office or agency of the Railway Company in the Borough of Manhattan, in the City and State of New York, or *at designated offices in the foreign cities and countries above mentioned*" (R. 19).¹

The coupons for interest also contained multiple currency provisions substantially similar in form to those in the bonds. The form of the coupon was as follows (R. 2. 131):

"No. _____	19
\$25.	\$25.
105.05 Marks.	£5 2s 10½d.
129.50 Francs	62.25 Guilders.

On the first day of _____, 19____, St. Louis Southwestern Railway Company will pay to the bearer, *upon presentation and surrender* of this coupon for cancellation, at its office or agency in the Borough of Manhattan, in the City of New

¹Italics in this brief are ours, unless otherwise designated.

York, Twenty-five Dollars (\$25) in United States gold coin, *or in* London, England, £5 2s. 10¹/₂d Sterling, *or in* Amsterdam, Holland, 62.25 guilders, *or in* Berlin, Germany, 105.05 marks, *or in* Paris, France, 129.50 francs, being six months' interest then due upon its First Terminal and Unifying Mortgage Bond, No. . . .

These bonds were issued in 1912 by the Debtor to an original group of American purchasers who paid dollars therefor and were resold to the public generally (R. 132-4). Before executing the mortgage, the Debtor made arrangements for the payment from time to time of the foreign exchange value of such guilders and other foreign currencies as might be demanded pursuant to the foreign currency alternatives in the bonds and coupons (R. 172-3). The fact that such arrangements were made demonstrates that the Debtor had no thought of the guilder option as a gold clause. Furthermore, the Debtor's president in his letter (summarized in the offering circular of the bonds) held forth to intending purchasers the multiple currency options (R. 133-4, 160). The record does not show to what extent purchasers then and subsequently relied upon this inducement, but it does show that the Debtor received valuable and sufficient consideration for the bonds, of which the guilder option was an integral part (R. 160), and that the bonds have been listed on the New York Stock Exchange since 1915 and have been actively traded in from that time on (R. 132-4). It is also a matter of record, and is uncontroverted, that many of these bonds have been held and are now held by citizens of foreign countries (R. 135, 198).

On December 12, 1935, the Debtor's petition for reorganization under Bankruptcy Act § 77 was filed and ap-

proved (R. 183). On January 1, 1936, the Debtor failed to pay interest on the coupon bonds as well as other obligations (R. 159), which non-payment was made an event of default on April 1, 1936 by the First Terminal and Unifying Mortgage (R. 66). Such default gave rise to broad powers in the petitioner as trustee under the Mortgage (R. 69-71, 76), authorizing it to protect and enforce the rights of bondholders thereunder by suits in equity or at law, or by any other proper or legal remedies, and also to accelerate the maturity of the bonds. These broad powers necessarily included a corollary or ancillary right in the Trustee to elect on behalf of the bondholders the most advantageous currency within the range of alternatives granted by the coupon bonds and the Mortgage.

On April 11, 1936, an event of default having occurred on April 1, 1936, the Debtor attempted to enjoin the petitioner from accelerating the maturity of the outstanding First Terminal and Unifying bonds. This attempt failed. *Guaranty Trust Company of New York v. Henneford*, 86 F. (2d) 347, certiorari denied 300 U. S. 661. The petitioner then served a notice of acceleration as of May 5, 1936 (R. 136).

On June 4, 1936, the petitioner published notice that it intended within a short time to elect to receive payment in guilders, and to file a proof of claim on a guilder basis, in respect of all coupon bonds the holders of which had not

"The respondents challenged the right of the petitioner to make an election of the medium of payment on behalf of those bondholders who had made no election. Neither the District Court nor the Circuit Court of Appeals determined this question, regarding it as immaterial in so far as their decisions were concerned.

previously acted in their own behalf (R. 179).³ Thereafter on September 24, 1936, the petitioner caused formal demand and protest to be made by a bailiff in Amsterdam, in accordance with the law of Holland (R. 137, 169-172, 174-176), requiring the Debtor to pay immediately in guilders the principal and interest to it on behalf of all bondholders who had not previously made their own elections. This demand was not honored.⁴ On the same day the petitioner verified and mailed its proof of claim on behalf of those bondholders who had not filed their own proofs of claim (R. 2-6).

The exchange value of the guilder was 67.78 cents alike on the date of bankruptcy, of acceleration and of demand and protest of non-payment (R. 140; cf. R. 164, 104). The aggregate amount of principal claimed for the holders of 5,636 bonds by the petitioner was 14,033,640 Dutch guilders (\$2490 being the principal amount of guilders promised in each bond), having a dollar value at 67.78 cents of \$9,512,001.19.

The District Court disallowed the guilder claim in its entirety, without finding any exchange rate for the guilder.

³This notice, published in four American and three foreign newspapers, requested bondholders who did not desire an election to be made in guilders to notify the petitioner (R. 177). After the publication of the notice some bondholders specifically authorized the petitioner to elect guilders for them (Claimant's Exhibit 9, R. 180-3); a few bondholders filed individual proofs of claim electing dollars; while a more numerous class individually elected guilders.

⁴The failure of the Debtor to maintain an office or agency in Amsterdam (R. 132), despite its agreement to make payment there, constituted a refusal which rendered any demand unnecessary. *Sokloff v. National City Bank*, 250 N. Y. 69 (1929).

Instead, the District Court allowed the claim as one for \$1,000 principal on each bond, or \$5,636,000 on the 5,636 bonds, with interest at 5% per annum from July 1, 1935, to December 12, 1935 (R. 126). This allowance was less by \$3,876,001.19 than the dollar value of the aggregate amount of guilders claimed by the petitioner on account of principal, in accordance with the precise terms of the bonds, and correspondingly less than the amount claimed as interest.

On the petitioner's appeals the Circuit Court of Appeals for the Eighth Circuit, on July 15, 1938, affirmed the order of the District Court (R. 254-5, 98 F. [2d] 160).

DECISION OF THE DISTRICT COURT

(R. 127-143)

(a) The findings of fact.⁵

There was no substantial issue of fact before the District Court, virtually all of the material facts having been stipulated by the parties, and most of the matters stipulated having been supported by documentary proof (R. 156-180). The narrative statement of the only testimony in the record consumes less than three pages (R. 198-200), perusal of which discloses that the testimony of this single witness was largely corroborative of the stipulated facts, and was unnecessary and of slight materiality.

⁵The petitioner took numerous assignments of error to these findings (R. 211-218), Assignments 6-17, and 35.

We do not suggest that the District Court's "findings" should be ignored,⁶ except where this Court considers them to be immaterial, unsupported by evidence, or not findings at all. Many of the "findings", it will be seen, are mere conclusions of law as to the meaning and construction of documentary evidence, as for example, that the guilder promise in the contract constituted a money contract, not a commodity contract (R. 134, 254); or that the provisions in regard to optional payment in foreign monies were inserted as an *additional* safeguard against monetary devaluation, *supplementing* the gold clause (R. 134); or that the amounts of foreign monies mentioned in the foreign money options were fixed as the equivalent in value of the United States gold coin of the standard of weight and fineness as it existed January 1, 1912 (R. 134, 252).

(b) The conclusions of law (R. 140-3).

1. The District Court held and concluded as a matter of law that the guilder alternative in these bonds and coupons falls within and is voided by the letter and policy of the Joint Resolution of June 5, 1933, because

(a) The guilder alternative in these bonds and coupons is not an independent alternative of equal rank with the dollar alternative, but is a promise to pay in dollars of the United States of a value as constant as that of gold.

⁶In their joint brief in opposition to the petition for certiorari, respondents referred to "findings" of the District Court, asserting that the facts so found and left undisturbed by the Circuit Court of Appeals "are not to be ignored" (pp. 6-7).

(b) The Resolution is not confined to gold clauses, but abrogates all alternatives and promises in addition to the gold coin alternative in these bonds.

(c) On June 5, 1933, the bonds and coupons in suit were "obligations payable" in money of the United States, within the meaning of the Joint Resolution, and are thereby required to be paid "dollar for dollar" in money of the United States.

(d) The Court was not bound by *Anglo-Continental Treuhand, A.G. v. St. Louis Southwestern Railway Company*, 81 F. (2d) 11 (C. C. A. 2, 1936), cert. den. 298 U. S. 655, where the guilder alternative in this same issue of bonds was held immune from the Joint Resolution.

(e) *Holyoke Water Power Co. v. American Writing Paper Co.*, 300 U. S. 324, is inconsistent with and in effect overruled the *Anglo-Continental* case.

2. The court held that the petitioner's claim on a guilder basis should not be allowed; and it scaled down the claim from the value of the guilders, which the Debtor failed and refused to pay in accordance with its contract, to the nominal dollar amount stated in the gold clause alternatives, which the Debtor never came under a contractual duty to perform for want of an election.

3. The court held that the option for guilders in the bonds and coupons became inoperative when the Joint Reso-

lution was passed and that consequently the election of guilders "was and is wholly ineffective and without any force or effect".

4. In view of the foregoing conclusions, the court decided it was "unnecessary" to pass on the respondents' other objections (R. 143).⁷

DECISION OF THE CIRCUIT COURT OF APPEALS

(R. 246-254; 98 F. [2d] 160)

The Circuit Court of Appeals for the Eighth Circuit, in affirming the District Court, confined its decision to the single question of the effect of the Joint Resolution of June 5, 1933, upon the present claim. It did not attempt to dispose of any of the other issues raised by the respondents, but indicated their lack of substance by saying (R. 247; 98 F. [2d] at 162):

"The *outstanding controversy* in this court, as in the trial court, is whether these provisions of the deed of trust and of the bonds (including interest coupons) *giving an option of payment in currencies other than American gold dollars* is rendered nugatory by the Joint Resolution of Congress, approved June 5, 1933 . . ."

This sentence, incidentally, is the only one in which the court so much as purported to construe the nature of the alternative contract upon which the present claim is based; and it indicates that the court misconstrued that contract by assuming that the Debtor was under an obligation to

⁷The extensive assignments of error taken by the petitioner are found in R. 211-218.

pay gold dollars *unless and until* the option of payment in one of the other specified currencies was exercised. The bonds, as will be seen, did not so provide, but provided for payment in gold dollars only as and if the option to receive such payment should be properly exercised. Apparently the court regarded the only matter before it as one "of the construction of the Joint Resolution" and therefore devoted little or no attention to the construction of the claim itself, which we believe to be equally important, if not decisive.

On the construction of the Joint Resolution, the court recognized as being squarely in point the cases of *Anglo-Continental Treuhand, A. G. v. St. Louis Southwestern Railway Company*, 81 F. (2d) 11 (C. C. A. 2d, 1936) and *McAdoo v. Southern Pacific Company*, 10 F. Supp. 953 (N. D., Cal. 1935), holding that the Resolution did not cover multiple currency provisions. It refrained from following those authorities for the astonishing reason that in them the Resolution was held to be "clear and unambiguous."

The court was of the opinion that the word "payable" as used in the Resolution was "crucial" and that, standing alone, it was not susceptible of one single definite meaning. In the language of the Resolution, it was unable to find any satisfactory definition of the word "payable." Searching for the evil sought to be remedied by the Resolution, it found this evil to be the traditional gold clause described in the preamble and in the first section. Turning back to the bonds and coupons in question, the court found that they contained such a gold clause, as well as alternative provisions for the payment of stated amounts in guilders, pounds, francs, or marks.

Thereupon the court reached the single ground upon which its entire decision must rest, stating (R. 252: 98 F. [2d] at 165):

"The amount of guilders, pounds, francs or marks which might be elected by the obligee was admittedly, determined by the value of the gold dollar as of January 1, 1912."

That was the date as of which the bonds were issued. It was for this reason alone that the court held that the guilder alternative in these bonds had the same prohibited effect as a gold clause and was therefore unenforceable. Though recognizing that the multiple currency provisions may have been inserted in the bonds pursuant to "an entirely proper business purpose", the court nevertheless said the effect, not the purpose, controlled, and that "the effect is to freeze the unit of payment as of the gold dollar of the weight and fineness of January 1, 1912" (R. 252: 98 F. [2d] at 165). The remainder of the opinion, dilating on the assumed "advantage" or "premium" that would result to the bondholders by "running around an international stump—passing through Holland en route", is predicated upon the erroneous hypothesis that the guilder claim was the legal and factual equivalent of a claim for gold or gold coin, based upon a traditional gold clause.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals and the District Court erred in holding that the claim for guilders, or the dollar value thereof at the applicable exchange rate, is barred by the Joint Resolution of June 5, 1933, 48 Stat. 112.

SUMMARY OF ARGUMENT

I. The claim in controversy is based exclusively upon an absolute and independent contract to pay guilders in Holland.

II. The Joint Resolution of June 5, 1933, does not affect the contract of the Debtor in these bonds and coupons to pay guilders or the option to receive payment of guilders in Holland.

III. Any construction of the Joint Resolution so as to reach the guilder option in these bonds and coupons would render the Resolution unconstitutional.

I

THE CLAIM IN CONTROVERSY IS BASED EXCLUSIVELY UPON AN ABSOLUTE AND INDEPENDENT CONTRACT TO PAY GULDERS IN HOLLAND.

A correct understanding of the nature of the claim in suit is, we believe, decisive of this controversy. The Debtor contracted in these bonds and coupons to pay guilders in Amsterdam, Holland. After all conditions precedent had been satisfied and the bonds and the applicable coupons for interest had fallen due, the Debtor failed and refused to perform its contract, though formal demand was made upon it at the designated place of payment. The present claim is simply one on behalf of the holders of 5,636 bonds and coupons for damages resulting from this breach of contract by the Debtor. The petitioner asserts no other claim.

As we see it, therefore, the only issue before this Court is whether such a claim for damages for breach of a foreign money contract, executed in 1912, is prohibited or diminished by the Joint Resolution of June 5, 1933. The respondents in their brief in opposition to the petition for certiorari, said with regard to this issue that it

"relates to an agreement payable solely in guilders in Holland, and we have no difficulty in joining with the petitioner in answering it 'No.'"

That admission would seem to leave no issue for the Court to decide.

Neither of the courts below squarely determined that a contract payable solely in guilders in Holland falls within the condemnation of the Joint Resolution. To the contrary, the conclusions of law of the District Court (R. 1403) and the opinion of the Circuit Court of Appeals (R. 24-254), though not expressly deciding the point, clearly implied, by holding that the petitioner's claim was not based on such a contract, that a contract to pay guilders in Holland would be valid and fully enforceable. The primary issue, therefore, is whether petitioner's claim is based upon a contract to pay guilders, which would be valid, or whether

"This statement at page 7 of respondents' brief was made with specific reference to Question No. 1 at page 2 of the petition, which was—

"1. Does the Joint Resolution of June 5, 1933 (48 Stat. 112), abrogating 'gold clauses' annul a negotiable contract executed in 1912 by the Debtor wherein it agreed to pay to the holder of the instrument a stated number of Dutch guilders at Amsterdam, Holland?"

it is founded on some other contract, condemned by the Joint Resolution.

The bonds and coupons, the instruments wherein are set forth the contracts for guilders upon which the petitioner relies, also contain gold clauses. It was the presence of the gold clauses in these bonds and coupons that defeated the petitioner's guilder claim below. Neither the District Court nor the Circuit Court of Appeals could distinguish between the petitioner's claim on the guilder contract and the gold clause, which, as we shall see, never became operative, was never relied upon by the petitioner, and is and has always been legally separate and distinct from the guilder contract.

We readily concede that the Joint Resolution would prohibit the enforcement of the gold clauses in these bonds and coupons, should any one attempt to enforce them. But no one, least of all the petitioner, has ever attempted to enforce those clauses. We contend that the physical inclusion of the gold clause in the instruments evidencing the contracts sued on is wholly immaterial because the guilder contract, which is the basis of this action, is just as independent and distinct from the gold clause and just as enforceable as though the two were contained in entirely separate instruments.

A. Each of the alternative promises contained in these instruments is complete in itself and independent of the other, except that all the alternatives are mutually exclusive.

Although the bonds and coupons, or instruments upon which the present claim is founded, contain five promises, these promises are all stated in the alternative, so that no

one of the alternatives is dependent upon any other, except in so far as the election or acceptance of one would perforce relieve the Debtor from any duty of performing the other's. This becomes apparent upon reference to the instruments themselves.

In the form of coupon bond incorporated in the Mortgage (R. 19, 130) the Debtor promises to pay at maturity

"One thousand Dollars in gold coin of the United States of America, of or equal to the standard of weight and fineness as it existed January 1, 1912 or in London, England, £205 15s 2d, or in Amsterdam, Holland, 2490 guilders, or in Berlin, Germany, marks 4200, D.R.W., or in Paris, France, 5180 francs, and to pay interest thereon, at the rate of five per cent. per annum, Payment of the principal and interest on this bond will be made, at the holder's option, at the office or agency of the Railway Company in the Borough of Manhattan, in the City and State of New York, or at designated offices in the foregoing cities and countries above mentioned."

The promises to pay interest in the coupons are substantially similar in form (R. 22, 131).

The promises are true alternatives. No one of the promised currencies of payment is primary and none is subordinate. Each of the promises is subject to the identical contingency or condition precedent: *vis.*, election of the place and currency of payment by or on behalf of the holder. The words "at the holder's option" precede the designation of the places that govern the currency of payment. The holder must elect; he cannot receive payment in more than one currency; and, upon the election of one

alternative, the Debtor's duty to pay in a particular currency at the particular place becomes fixed, thus automatically and permanently relieving the Debtor of any duty or liability in respect of the other four alternative promises. These plain truths regarding the alternatives in these bonds and coupons should require no further elaboration; the meaning and effect of the instruments is plain and unambiguous.

The contention will be made that the foreign money alternatives were intended for the benefit of aliens only, and not of citizens, and that most of the bondholders whom the petitioner represents are Americans. No indication of such an intent can be found within or outside of these instruments. The bonds were sold to an original group of American purchasers (R. 132-4) whose attention was specifically called to the fact that they were payable in foreign currencies, at the election of the holder (R. 133-4, 160). There is no indication in the terms of the bonds and coupons, and there was no suggestion to purchasers at the time of sale, that the holder could receive payment only in the currency of his domicile. Although it is true that many of these bonds were subsequently sold abroad and are now held by foreigners (R. 135, 198), there is no reason to suppose that an Englishman could elect payment only in pounds, a Dutchman only in guilders, etc. It is clear from the instruments that, just as a Dutchman is free to choose dollars instead of guilders, so an American holder has an absolute right, at his election, to receive payment in guilders.

Inasmuch as the bonds themselves are unambiguous and give no one alternative precedence over the other in legal effect, resort to extraneous material in an attempt to prove that the bonds and coupons are primarily dollar obligations

is not warranted. The respondents have heretofore emphasized that the bonds were issued in 1912 to an original group of purchasers in America who paid dollars therefor (R. 132, 160); that the proceeds were expended in this country (R. 133, 160-3), that a substantial amount of the bonds was held by American citizens in 1935 (R. 135), that before 1933 the coupons for *interest* on the bonds had been regularly paid in American dollars, and that the Debtor had never maintained any office or agency in any of the four countries named in the bonds, for the payment of the foreign money promises (R. 134). The significance of these facts is purely historical. Even if it were permissible to disregard the terms of the plain and unambiguous contract in these bonds for the payment of foreign currencies, the foregoing facts would have little or no probative force. It is not contended that the Debtor never intended to pay the bonds in the foreign currencies promised when the bonds were issued; it is not contended that any of the foregoing facts or circumstances were sufficient to constitute a waiver or estoppel, so as to eliminate the foreign money alternatives from the bonds and coupons.

The amount of 2,490 guilders on the face and in the text of each bond is no less fixed, absolute and independent than is the amount of \$1,000 alternatively promised in the same bond. No reference to the Mortgage Indenture or to historical data can alter the fact that in these bonds the Debtor promises to pay "at the holder's option" stated amounts in five designated currencies, which are connected with the word, *or* and thus made *disjunctive* obligations, mutually exclusive. The words "at the holder's option" in the text of the bond precede *all five* places of optional payment, including the place where dollars are to be alterna-

tively paid. While the respondents below pointed to a clause in the Mortgage Indenture alleged to be slightly different,⁹ the unmistakable language of the bonds must in any event prevail, particularly in view of the fact that this language is textually set forth in the Indenture (R. 19) and in view of the further fact that the covenant in the Indenture is to pay the bonds "at the dates and the places and in the manner mentioned in such bonds . . . according to the true intent and meaning thereof" (R. 59). A fundamental error of the courts below was their failure to recognize clearly the perfect equality of the five options in these bonds and coupons, and their tendency to consider the dollar option as the primary medium of payment which would govern if no foreign currency option was effectively exercised. Both the District Court (R. 141) and the Circuit Court of Appeals (opinion quoted at p. 14 above) fell into this error.

⁹This is Article First, Section 4 of the Mortgage providing that the coupon bonds

"shall be payable at the office or agency of the Railway Company in the Borough of Manhattan, in the City and State of New York, or; at the option of the holders of said coupon bonds, in the cities and countries, respectively, and, in the respective currencies stated in the form of coupon bonds hereinbefore set forth [i.e., that quoted at p. 20 above], but the face amount of each of such coupon bonds shall be \$1,000 in United States gold coin of the standard of weight and fineness existing on January 1, 1912, or the equivalent thereof, calculated at the rates of exchange stated in the form of coupon bond hereinbefore set forth."

It cannot reasonably be contended that the effect of this language is to make the dollar alternative primary and subordinate thereto the foreign currency alternatives, since the language does not require such an inference and the contrary statement in the bonds themselves is clear and unmistakable.

As a matter of law it is a plain misconstruction of the instruments.

B. The guilder alternative in these bonds is not the equivalent of or a substitute for the gold clause alternative.

The effect of the multiple currency provisions in these bonds is no more "to freeze the unit of payment as of the gold dollar of the weight and fineness of January 1, 1912", as the court below held (R. 252; 98 F. [2d] at 165), than it is to fix the unit of payment as of the value of the paper dollar of the same date. The paper dollar and the gold dollar of January 1, 1912 were identical in value, and mutually exchangeable. Nevertheless, as we have seen (pp. 12, 16 above), the Circuit Court of Appeals and the District Court stake their decisions upon the ground that the foreign money alternatives in these bonds were identical with and the equivalent of the gold coin alternative, also in the bonds, because Article First, Section 4, of the Mortgage Indenture provided (R. 39) that as of January 1, 1912, the amounts of the foreign currencies alternatively promised should be "the equivalent" of \$1,000 in the gold coin of the United States of that same date. We are compelled to assume, because of the undue emphasis placed upon the word "gold", that the courts below would not have held the guilder alternative to be the equivalent of the gold clause alternative if the amount of guilders stated in the bonds had been fixed in 1912 as the equivalent of one thousand paper dollars.

Yet it cannot reasonably be said that because the draftsman of the Mortgage Indenture calculated the rates of exchange for the multiple currency clauses on the basis of

the *gold* dollar of 1912, the guilder option, if exercised today, is the equivalent of a promise to pay gold coin of the United States of the standard of weight and fineness as it existed on January 1, 1912. Some one currency had to be selected as the basis for calculating the rates of exchange for the purpose of control and to prevent an over-issue of bonds. Inevitably, the dollar was so chosen because it was the currency of the Debtor's residence. The very fact that the alternative amounts were fixed so as to be equivalent in value as of a certain date indicates that the Debtor foresaw the possibility of wide *subsequent* fluctuations and discrepancies in the value of the alternative amounts, such as to raise the possibility of an over-issue. Certainty of equivalence as to the five alternative amounts could not survive the execution of the mortgage. Any equivalence thereafter would be fortuitous and beyond the control of the parties. Foreseeing the possibility of wide subsequent fluctuations, the Debtor yet undertook in unmistakable terms to be bound by the consequences measured by the fair exchange value of the foreign currencies in dollars, if it could not or preferred not to pay any foreign currency elected.

At this point the error of the Circuit Court of Appeals becomes susceptible of mathematical demonstration. In its opinion that court said (R. 252, 98 F. [2d] at 165):

"The amount of guilders, pounds, francs or marks which might be elected by the obligee was, admittedly, determined by the value of the gold dollar as of January 1, 1912. The only effect of stating the precise amounts in those foreign currencies was to make definite and certain what might have been expressed as 'guilders, pounds, francs or marks which would be the equivalent of their values on

January 1, 1912, as measured by the value of one thousand gold dollars of the weight and fineness as of that date.' ”

That the Circuit Court was wrong in finding the foreign currency options to be a gold equivalent is readily seen if we take the French franc option as a test. The exchange equivalent of the French franc in terms of the January 1, 1912 gold dollar was 19.2948 cents, and accordingly the French franc alternative was fixed in the coupon bond as 5180 francs (R. 19, 39). Since January 1, 1912, the dollar has been devalued once, and the franc several times. The dollar, which in 1912 was 25.8 grains of gold, nine-tenths fine, is now 15 and 5/21 grains of gold, nine-tenths fine. The franc, which in 1912 was worth 19.2948 cents, is now worth 2.65 cents of the present dollar or 1.56515 cents of the 1912 dollar.¹⁰ Thus the number of francs which (in the words of the Eighth Circuit Court of Appeals)

“would be the equivalent of their values on January 1, 1912, as measured by the value of one thousand gold dollars of the weight and fineness as of that date”

is 63,891.64 francs, not the 5,180 francs specified in the bond; and the Circuit Court's conclusion that the foreign currency amounts specified in the bond are the necessary equivalent of one thousand 1912 gold dollars is completely and basically erroneous.

¹⁰The authorities are Act of March 14, 1900, 31 Stat. 45; Gold Reserve Act of 1934, 48 Stat. 337; Presidential Proclamation of January 31, 1934; New York Times January 14, 1939, Foreign Exchange quotations, p. 22; Handbook of Foreign Currency and Exchange (United States Department of Commerce 1930), p. 70; Tate's Modern Cambist (1922), p. 249.

The guilder option was not a "gold" contract when it was inserted in the bonds and coupons in 1912, and has not been a "gold" contract at any time thereafter. The stipulated evidence and the findings of fact of the District Court based thereon leave no doubt as to the relation to gold which the Dutch guilder has had at all times (R. 137-140, 165-7). It is conceded that the holder of guilder notes has never been entitled to claim either gold or gold coin from the Central Bank of Holland; that the Central Bank of Holland has never been known to redeem its notes in gold; but that prior to September 27, 1936, when Holland went off gold, the Central Bank delivered gold for export, whenever the exchanges on countries maintaining a market for gold reached gold export point. A promise to pay guilders is no more a "gold" promise than a promise to pay present-day dollars would be. Though both guilder and dollar notes are based on gold, neither is redeemable in gold.

The Debtor and the petitioner, as its corporate trustee, clearly understood that the obligation of the Debtor with respect to the guilder payments would be measured by an ordinary banker's rate of exchange. The Debtor deliberately took the risk of that exchange; that is, that the dollar would stay on gold as long as the guilder. In a letter to Guaranty Trust Company of New York, dated March 25, 1912, with reference to coupon payments in Amsterdam, the Debtor said "the foreign exchange necessary in the transaction is to be furnished by you at a fair current rate" (R. 172).

Clearly then, the Debtor understood its liability under the guilder alternative in these bonds and coupons to be no different from any liability it would assume in a simple contract for the payment of a stated number of guilders in

Holland. The fact that the original amount of guilders promised happened to have been calculated at the prevailing rate of exchange on January 1, 1912, and the fact that the bonds contain an alternative promise to pay gold coin of the United States, as well as a promise to pay guilders, were immaterial in the Debtor's own opinion. The guilder alternative in these bonds, therefore, can be the equivalent of a promise to pay gold, gold coin or money of the United States measured thereby only if a straight contract to pay guilders would also constitute such a gold clause. There can be no difference in legal effect between a straight contract to pay guilders and an alternative contract to pay guilders. As already shown (pp. 11-16, 18 above), both of the courts below were careful not to hold that a straight contract to pay guilders constitutes a promise to pay gold or gold coin within the Joint Resolution, and the respondents have conceded that such a contract would not be touched by the Joint Resolution.

The law is clear that a contract to pay guilders in Holland, whether it be in alternative or absolute form, is not the equivalent of a gold clause or a contract to pay in money of the United States measured by gold. The relative values of the currencies of different nations have been traditionally governed, not by gold, but by the cost of shipping gold or the gold export point. Accordingly, it has been held that a contract to pay guilders is valid and enforceable and is radically different from a contract to pay gold or gold coin or money of the United States measured thereby. This was the decision in *Anglo-Continentale Treuhand, A. G. v. St. Louis Southwestern Railway Company*, 81 F. (2d) 11 (C. C. A. 2nd, 1936), cert. den. 298 U. S. 655, where the

court said, in upholding the guilder alternative in these bonds:

"As has been seen, the coupons contained alternative promises; the holder might demand gold, dollars, pounds, guilders, marks or francs at his choice. *If he chose any of the foreign currencies he could not get gold; he must be content with whatever the money of the country might be on the due date; it might then be exchangeable for all sorts of things, gold, silver, copper, land, coffee; it might be 'inconvertible', not exchangeable for any thing at all. When for example France and Germany and England went off the gold standard the defendant was relieved pro tanto, as it will be if Holland should similarly go off; it is therefore of no significance that she happens not to have done so in 1934 and 1935. If this were not plain enough from the absence from the promise of any requirement to pay gold, the contrast between foreign currencies and 'dollars in gold' would put it beyond doubt.*"

So, also, in *McAdoo v. Southern Pacific Company*, 10 F. Supp. 953 (N. D., Cal., 1935); reversed solely on jurisdictional grounds 82 F. (2d) 121 (C. C. A. 9th, 1936), the court said in holding that foreign money alternatives were not nullified by the Joint Resolution (p. 954):

"Congress [in the Joint Resolution] was dealing with contracts calling for payment in gold coin of the United States, not with contracts payable in money of foreign countries."

The court further observed (p. 955):

"But clearly the money of foreign countries is a commodity and on the same footing as other com-

modities . . . Guilders and francs are dealt in, upon the exchanges of the country, as are securities, grains, and other chattels. They have a well-established current value in terms of money of this country."

There is no conflict in the authorities with respect to the precise holdings in the *Anglo-Continentale* and *Medley* cases to the effect that a contract to pay guilders is not the equivalent of a gold clause prohibited by the Joint Resolution.

The foregoing authorities merely apply to bonds and coupons containing multiple currency options the settled doctrine that a contract to pay the money of a foreign country must be recognized as a contract calling for the payment of money in so far as it is to be performed or enforced in the foreign jurisdiction, and a contract for the delivery of a commodity in so far as it is to be performed or enforced in this country. In neither case can such a contract be treated as a contract for the payment of gold coin of the United States, or money of the United States measured thereby. In the *Conflict of Laws* Restatement, Section 423, comment a the rule is stated:

"A contract to deliver foreign money is really a contract to deliver a commodity and the measure of damages is the same as for the breach of a contract to deliver a chattel."

This principle is recognized in New York, where the bonds in question were issued and delivered. *Richard v. American Union Bank*, 253 N. Y. 166, 174 (1930).

Guilders are lawful money in Holland (R. 137) and a contract to pay guilders in Holland must be regarded as

courts as valid and enforceable, regardless of currency fluctuations. This Court so held in *Deutsche Bank v. Humphrey*, 272 U. S. 517, 519:

"An obligation in terms of the currency of a country takes the risk of currency fluctuations and whether creditor or debtor profits by the change the law takes no account of it. Legal Tender cases, 12 Wall. 457, 548, 549. Obviously, in fact a dollar or a mark may have different values at different times but to the law that establishes it it is always the same."

The rule in New York is the same. In *Richard v. American Union Bank*, 241 N. Y. 163, 167 (1925), the Court said with reference to a contention that the market value of Roumanian lei had declined in Roumania:

"During all the times in question lei continued to be the same monetary unit and plaintiffs obtained on the deferred date the same number of lei to which they were entitled on the due date and it is impossible to say that lei, measured by lei, had declined in market value."

It is thus perfectly clear that a contract for the payment of foreign money in a foreign country, whether viewed

"See generally to the same effect:

Hicks v. Guinness, 269 U. S. 71, 80;

Tillman v. Russo-Asiatic Bank, 51 F. (2d) 1023, 1025 (C. C. A. 2d, 1931);

Wichita Mill v. Naamiboze Industrie, 3 F. (2d) 931, 933 (C. C. A. 5th, 1925);

Equitable Trust Co. v. Keene, 232 N. Y. 290, 294 (1922);

Cash v. Kennion, 11 Vesey Jr. 314; 32 Eng. Rep. 1109 (1805);

22 Col. L. Rev. 217, 235 (1922).

from the standpoint of this country as calling for the delivery of a commodity, or the standpoint of the foreign country as calling for the payment of money, is not a contract for the payment of gold, gold coin, or money of the United States measured thereby.

C. The invalidity or unenforceability of the gold coin alternative in these bonds and coupons can in no way affect or detract from the validity of the remaining alternatives.

Even if the gold coin alternative in these bonds and coupons was intended to be primary, even if the foreign money alternatives in the same instruments were intended to be the equivalent of the gold coin alternative, as we have seen was not the fact, still the validity of the foreign money alternatives would in no way be dependent upon the validity of the gold coin alternative. Such a conclusion is compelled by the well-known doctrine that the invalidity or impossibility of performing one alternative in a contract, where the parties are not at fault, furnishes no legal excuse for not performing the remaining alternatives. In such a situation it becomes immaterial whether the void alternative was primary, co-ordinate, or secondary; it is of no consequence that the parties intended the alternatives to be mutually equivalent. The rule is stated as follows in 6 Williston on Contracts (Rev. Ed. 1938), § 1779, pages 5060-1:

"Where some things promised are illegal and some legal, the latter may be enforced if consideration is legal."

It was early decided that where some covenants of an indenture are legal and others illegal the legal covenants may be enforced. This is the simplest

form of the problem of partly illegal contracts. If legal consideration has actually been given and a unilateral contract formed, or if the promises are under seal and binding without consideration, the rule thus early established has never been questioned. For the same reason where one of two things is promised in the alternative, and one is lawful and the other unlawful, the lawful promise may be enforced. But a qualification must be added to the broad statement of the rule. If the whole transaction was for an illegal purpose, or probably if the illegal covenants showed gross moral turpitude, the other covenants, though in themselves perfectly legal, would not be enforced."

The qualification of the general rule, as stated by Professor Williston, has no application here, inasmuch as the issuance of these bonds was concededly for a legitimate purpose and the bonds in their entirety were undoubtedly lawful when issued. Thus, the fact that some twenty years after their issuance, the gold coin alternative therein was declared by Congress to be against public policy, finds no parallel in those cases where one alternative in the contract was void at its inception and the contract was made with an illegal or immoral purpose. Illustrative of the exception to the general rule that one alternative in a contract is not affected by the invalidity of another are certain cases holding that, where one of two alternatives is void *ab initio* under the statute of frauds and is inseparable from the other alternative, the contract is void in its entirety. *De Bessy v. Paige*, 36 N. Y. 537 (1867). Even in the statute of frauds cases, where one alternative was clearly void at its inception, the authorities are not in agreement as to whether the remaining alternatives are affected. See the

cases collected in 13 A. L. R. 271-274.¹² Another illustration of a possible exception to the general rule is found in *Johnson v. Joyce*, 90 Minn. 377; 97 N. W. 113 (1903). In that case an alternative contract for the payment of wheat was held unenforceable and void (1) because there was no consideration to support it, and (2) because it was made for the express purpose of evading the usury statute. These and other authorities wherein contracts which are partly illegal were held to be unenforceable in their entirety, were urged by the respondents in the courts below. None of them, however, involve contracts, such as the bonds and coupons here, which were valid in their entirety when made and which were issued for a perfectly legitimate business purpose.

The courts below were undoubtedly influenced in their decisions by the knowledge that the gold clause in these bonds was stricken down by the Joint Resolution of June 5, 1933. Although neither court stated in so many words that the invalid gold clause nullified the entire contract in these instruments, nevertheless they both reached the same result by holding that the foreign currency alternatives were the equivalent of or a substitute for the gold clause in the bonds and, therefore, dependent on it. Thus, the Circuit

¹²It is significant that in every case collected in this appellation where an alternative contract was held void in its entirety because one of the alternatives was void at its inception as falling within the statute of frauds, the obligor had the power of electing which of the two alternatives he would perform. This furnishes another material distinction between the statute of frauds cases and the alternative promises contained in these bonds. In other words, the obligor, if he has the power to elect, might elect the void or illegal alternative, thus relieving himself from any duty or liability with respect to the valid or legal alternative.

Court of Appeals, because the amount of the foreign currencies "was, admittedly, determined by the value of the gold dollar as of January 1, 1912", concluded (R: 253; 98 F. [2d] at 165):

"Hence, the holder is secured from depreciation of the gold dollar not only by a gold clause provision but by a four-fold further assurance in these foreign currencies of values based on the specified gold dollar."¹³

As we have observed, however, neither Court held that the promise to pay guilders, if standing alone, would have been affected by the Resolution; they predicated their decisions wholly upon the facts (1) that the bonds contained an invalid gold clause, and (2) that on January 1, 1912, the amounts promised in each of the foreign money alternatives were the equivalent in value of the amount promised in the gold clause alternative.

Not only are these two factors immaterial, for reasons already given, (pp. 19-32 above), but they are also immaterial because of the doctrine of law that the invalidity of one alternative cannot impair the contract contained in the remaining alternative.

If these bonds had been issued after the passage of the Joint Resolution of June 5, 1933, then the question whether the foreign money alternatives were inserted in

¹³The District Court took a similar view, stating among other things, in its Conclusion of Law No. 9 (R. 142):

"... the alternative forms of payment in the Bonds here involved shed light upon each other; the obligations require the payment of money and not the delivery of a commodity:

See also Conclusion of Law No. 10 (R. 143).

the instruments for the purpose of evading the Joint Resolution, by attempting to provide for "a four-fold further assurance in these foreign currencies of values based on the specified gold dollar" (R. 253), might become relevant. This, however, was not the fact. It cannot be that there was any original vice in calculating the foreign currency amounts with respect to the value of the gold dollar prior to the issuance of the bonds in 1912; or that there was any unlawful or immoral purpose in including a gold clause in these instruments when they were issued in 1912. At that time, the gold dollar was the legal standard of monetary value in the United States, and good business practice favored the use of that standard as a monetary measure in all contracts calling for payment in money. It was a practice expressly sanctioned by the decisions of this Court: e.g., *Bronson v. Rodes*, 7 Wall. 229, 250 (1868). This being so, the subsequent invalidity of the gold coin alternative in these bonds can have no adverse effect upon the enforceability of the other alternatives. Each alternative must be tested as a single contract and must either stand or fall alone.

That the cases dealing with alternatives that are void *ab initio* or that are made pursuant to an unlawful purpose are inapplicable where the entire contract was valid at its inception was expressly noted in *Irvine v. Postal Telegraph-Cable Co.*, 37 Cal. App. 60, 66, 173 Pac. 487 (1918). There one of two alternatives in a contract was held to be enforceable, even though performance of the other had been made illegal by statute after the execution of the contract. In distinguishing those cases where the contract is illegal at inception, the court said at page 66:

"The rule that, where parties to an illegal contract are *in pari delicto*, the court leaves them as it finds them, does not apply in the present case, where the contract was a legal, just and equitable one when made, but which has become unlawful in part by subsequent legislation."

Thus in *Rosenthal v. Perkins*, 123 Cal. 240, 50 Pac. 804 (1878), the promise of the debtor in an attachment bond to return the attached property to the creditor was held void because of the debtor's subsequent bankruptcy, but the sureties on the bond were nevertheless held to the alternative promise to pay the value of the property.

Even if one of the alternatives is originally illegal, the other alternative will be enforced if the two are not so mingled and bound together, by wrongful purpose, or otherwise, that they cannot be separated. A striking illustration of such a case is *Hanauer & Co. v. Gray*, 25 Ark. 350; 99 Am. Dec. 226 (1869), where action was brought on a promissory note "payable in Confederate bonds or Tennessee money". The promise to pay Confederate bonds was held to be illegal, but the alternative providing for payment in Tennessee money was held legal and enforceable, the court saying (p. 352):

"... the promises are not so mingled and bound together that they cannot be separated."

Thus the Restatement on Contracts, Section 344, Comment (b), holds that the valid alternative is enforceable, irrespective when the other alternative became illegal:

"If before breach all the alternatives but one are eliminated by impossibility, illegality, or otherwise,

the contract ceases to be an alternative one; and damages for breach are measured according to the single performance now required."

It is significant that illegal alternatives are placed in the same category in the foregoing statement as alternatives that become impossible of performance. The rule regarding the impossibility of one alternative (including supervening illegality) is given in the Restatement on Contracts, Section 469, as follows:

"Impossibility of performing one or more but less than all of a number of performances promised in the alternative in a contract discharges neither the duty of the promisor if by the terms of the contract he had the privilege of choice, nor the duty of the promisee if he had that privilege, but merely destroys or limits the possibility of choice; except where a contrary intention is manifested or the impossibility exists at the time of the formation of the contract and there is such a mistaken assumption of the existence of a fact as renders the contract voidable under the rule stated in § 502."

In 6 Williston on Contracts (Rev. ed. 1938), § 1961 at page 5504, the rule is given:

"Where a contract provides that one of two alternatives shall be performed by the promisor, the fact that one alternative is, or becomes, impossible does not excuse the promisor from performing that which remains possible,"

In *Yankton Sioux Tribe of Indians v. United States*, 272 U. S. 351, this Court held the Government bound to per-

form the remaining alternative in its contract with the Sioux Tribe, although the first alternative was impossible of performance (p. 358),

" . . . in virtue of the principle that, where promises are in the alternative, the fact that one of them is at the time, or subsequently becomes impossible of performance does not, at least without more, relieve the promisor from performing the other."¹⁴

Accordingly, the guilder alternative in these bonds and coupons is in no way affected by the fact that on June 5, 1933, some twenty years after the issuance of the bonds, the gold coin alternative was declared to be against public policy and thus became illegal and impossible to perform. Unless the Joint Resolution, invalidating the gold clause alternative, contains some affirmative provision to the contrary, the only effect of the nullification of the gold clause was to strike it from the bonds and coupons, leaving them with four, instead of five, valid and legally enforceable alternative promises.

D. The claim of the petitioner is either based on a single non-alternative contract to pay guilders or else there is no contract at all.

The question whether the petitioner had the authority to elect guilders on behalf of those bondholders who had

¹⁴See to the same effect *Board of Education v. Townsend*, 63 Ohio St. 514; 59 N. E. 223 (1900); *Independent Gas & Oil Co. v. Stephenson*, 80 Utah 531, 15 P. (2d) 317 (1932); *Drake v. White*, 117 Mass. 10 (1875); *State v. Worthington*, 7 Ohio Rep. 171 (1835); *Chappell v. McMillan*, 15 N. M. 686, 113 Pac. 611 (1911); 6 R. C. L. 1015, Sec. 376.

not made their own elections, was not passed on by either of the courts below, although it was raised by the respondents. The District Court, in holding that the claim was barred by the Joint Resolution, stated that it was "unnecessary" to determine any other issue raised by the respondents (R. 143), and in conclusion of law No. 6 it held that any election made after the passage of the Resolution "was and is wholly ineffective and without any force or effect" (R. 142).

Petitioner cited authorities below tending to establish its right as mortgage trustee to act for bondholders too widely scattered and too poorly informed to make an election themselves.¹⁵ In view of the failure of the lower courts to make findings on this point, we have not deemed ourselves justified in arguing the point in this Court. The

¹⁵The authorities cited by petitioner below on this point were *Rogers v. United Grape Products*, 2 F. S. 70, 71; *Guaranty Trust Company v. Henwood*, 86 F. (2d) 347, certiorari denied 300 U. S. 661; *Bankruptcy Act*, § 77(c) (7); *In re International Match Corporation*, 3 F. S. 445; *In Re United Cigar Stores Co.*, 68 F. (2d) 895; *In Re Paramount Public Corporation*, 72 F. (2d) 219; *Lane v. Equitable Trust Co.*, 262 F. 918, certiorari denied 252 U. S. 578; *Continental Equitable Title & Trust Co. v. National Properties Co.*, 273 F. 967; *McClelland v. Norfolk Southern R. Co.*, 110 N. Y. 469; *Restatement Trusts*, § 186, Comment (d); *Pomeroy Equity Jurisprudence* (4th ed.), Vol. 3, p. 2428; *New York Trust Co. v. Michigan Traction Co.*, 193 F. 175; *Old Colony Trust Co. v. City of Wichita*, 123 F. 762, affirmed 132 F. 841; *Marshall & Hsley Bank v. Guaranty Inv. Co.*, 213 Wis. 413; *State v. Comer*, 176 Wash. 257, appeal dismissed 292 U. S. 610; *Frishmuth v. Farmers Loan & Trust Co.*, 95 F. 3, affirmed 107 F. 169; *Farmers Loan & Trust Co. v. Central Railroad of Iowa*, 8 Fed. Cas. No. 4663.

holding below that any election of guilders was barred by the Joint Resolution of June 5, 1933, entitles us to assume for purposes of review in this Court that, but for the Joint Resolution, the election of guilders was properly made by the petitioner and was binding as to bondholders who made no election on their own behalf, after publication of notice by the petitioner that it proposed to elect guilders for them (R. 177). Respondent conceded that petitioner's normal demand for guilders and the protest for non-payment were made in Holland in accordance with Dutch law (R. 159, 173-6), and the District Court so found (R. 137).

Unless there was a valid election of one of the five alternative currencies promised in the bonds, no obligation of payment by the Debtor in any currency would have as yet matured in respect of the bonds and coupons in suit. As explained in *Comment a* of the Restatement on Contracts, § 325 (2):

"A contract may give an option either to the promisor or to the promisee. If the option is given to the promisee his exercise of the option is a *condition precedent* to any duty of immediate performance on the part of the promisor (§§ 263, 264), and on performance of the condition the contract is no longer alternative...."

In other words, the five alternatives, as originally contained in the bonds and coupons, were not obligations of payment, but were merely unexercised options or irrevocable offers by the Debtor. Until one of these options was accepted or exercised by or on behalf of the promisee, in whom the choice resided, the Debtor was under no con-

tractual duty to make payment in any currency; and until such election, the Debtor's only contractual duty was to keep the offers open. See Restatement on Contracts §§ 24 and 27. Accordingly, either the petitioner made a valid election of guilders and has an enforceable claim for guilders on behalf of those bondholders whom it represents, or there has been no election whatsoever of any of the alternative currencies of payment, with the result that the Debtor has not incurred any contractual duty to pay in any currency, whether it be dollars or guilders.

Because of the fact that the election of one alternative in an alternative contract is a condition precedent to the ascertainment of the duty to perform, it follows that upon such an election, the contractual duty thereby fixed is single and not alternative, just as though the contract had originally provided for only that performance which was elected. Thus, in § 344 of the Restatement on Contracts it is provided that:

"The damages for breach of an alternative contract are determined in accordance with that one of the alternatives that is chosen by the party having an election . . ."

It is explained in *Comment d* under this section that in those situations where the promisee, and not the promisor, has the election, there can be no breach until this power of election has been exercised. *Comment d* to § 344 reads:

"If the power to elect between alternative performances is in the promisee and not in the party who is to perform them, there can be no breach until after he has made his election."

Comment a under § 344 of the Restatement on Contracts further explains that, in cases where the choice between the alternatives resides in the promisee, on notice of the election made by the promisee "... the contract ceases to be an alternative one, and damages for breach will be measured just as if the contract had never been in the alternative."

Illustrations of the application of the foregoing principles are numerous and varied. Thus, the election of the place of performance of an alternative contract ordinarily determines the medium of performance and the law applicable thereto. Restatement of the Law of Conflict of Laws, §§ 356(1) and 364. So also an alternative contract, one alternative calling for the payment of money and another calling for some other method of performance, may nevertheless be negotiable if the right to elect between the alternatives is given to the holder of the promissory instrument. N. I. L. § 5(4). The reason for this rule is that if the holder elects the money alternative, the instrument becomes one for the payment of money and nothing else.¹⁶

Still another illustration of the rule is found in fire insurance contracts where the insurance company reserves the option to rebuild the premises instead of compensating the insured in money. The authorities hold that upon the

¹⁶See

Hodges v. Shuler, 22 N. Y. 114 (1860);

Hosstater v. Wilson, 36 Barb. (N. Y.) 307 (1862);

Sandlin v. Maury National Bank, 210 Ala. 349, 98 So. 190 (1923);

Pratt v. Higginson, 230 Mass. 256, 259; 119 N. E. 661, 663 (1918).

election of the insurer to rebuild the premises, the contract is converted from an insurance into a building contract."

A corollary to the rule that the election of one alternative reduces an alternative contract to a contract calling for a single performance is that the election by the party having the choice is ordinarily final and irrevocable. See *Twaits v. Pennsylvania R. R. Co.*, 77 N. J. Eq. 103; 110, 75 Atl. 1010, 1013 (1910), where the court said:

"Broadly stated, the law in respect to alternative rights or provisions under contracts is that the party having the right of choice, when he has once elected, is concluded thereby."

To the same effect are *Dimmick v. Banning*, 256 Pa. 295, 301, 100 Atl. 871; 873 (1917); 13 C. J. pages 629, 630.

These principles governing the law of alternative contracts were applied in the case of *Anglo-Continental Trading, A. G. v. St. Louis Southwestern Ry. Co.*, 81 F. (2d) 11 (C. C. A. 2, 1936), certiorari denied 298 U. S. 655, where the court held with reference to the option of the holder in these very bonds:

¹⁷ *Morrell v. Irving First Ins. Co.*, 33 N. Y. 429, 49 (1865);

Beals v. The Home Ins. Co., 36 N. Y. 522, 527 (1867);

Heilmann v. Westchester Fire Ins. Co., 75 N. Y. 7, 9 (1878);

Wynkoop v. Niagara Fire Ins. Co., 91 N. Y. 475 (1883);

Rubber Trading Co. v. Manhattan Rubber Mfg. Co., 221 N. Y. 120 (1917);

Globe & Rutgers Ins. Co. v. Prairie Oil & Gas Co., 248 Fed. 452, 456 (1917);

Cuasler v. Fireman's Ins. Co., 194 Minn. 325, 327, 260 N. W. 353, 355 (1935).

"If he chose any of the foreign currencies he could not get gold; he must be content with whatever the money of the country might be on the due date; it might then be exchangeable for all sorts of things, gold, silver, copper, land, coffee; it might be 'inconvertible', not exchangeable for anything at all."

Furthermore, the court expressed disapproval of the decision of the majority of the court in *City Bank Farmers Trust Co. v. Bethlehem Steel Co.*, 244 App. Div. (N. Y.) 634, rendered in disregard of the principle that, upon presentment of the coupon with multiple currency options in Holland, the contract became a single obligation for the payment of guilders. The conclusion of the Circuit Court of Appeals for the Second Circuit has just been adopted by the New York Court of Appeals in *Zurich General Accident & Liability Insurance Company, Ltd. v. Bethlehem Steel Company*, which thereby overruled the conflicting decisions below.¹⁸ The opinion in the *Zurich* case is a brief one, and the dissenting opinion of Merrell, J. in the *City Bank Farmers Trust* case remains the best exposition of the law with respect to the nature of the option in multiple currency bonds. The Court is respectfully referred to pages 643-4 of Mr. Justice Merrell's opinion.

So far as we have been able to discover, no court has expressly disagreed with the firmly founded proposition, applied in the *Anglo-Continental* case (and now by the New York Court of Appeals) that, upon the election of the holder of a multiple currency obligation to receive payment in guilders, the obligation ceases to be alternative and

¹⁸Decided January 11, 1939, as yet unreported and reproduced in Appendix A, pages 99-102 below.

becomes an absolute contract for the payment of guilders only. Instead, both the Circuit Court of Appeals and the District Court in the instant case regarded the election of guilders as immaterial. They failed to consider the fact that, after election, the obligations were no longer alternative, and that the only contract remaining was a single contract for the payment of guilders in Holland. Thus they entirely overlooked the distinguishing circumstance which removes the instruments in suit from the purview of the Joint Resolution.

II

THE JOINT RESOLUTION OF JUNE 5, 1933 DOES NOT AFFECT THE CONTRACT OF THE DEBTOR IN THESE BONDS AND COUPONS TO PAY GUILDERS OR THE OPTION TO RECEIVE PAYMENT OF GUILDERS IN HOLLAND.

Although neither court held or indicated that an absolute contract to pay guilders would fall within the Joint Resolution, the District Court concluded that (R. 142) "The option contained in the Bonds became inoperative on June 5, 1933 . . ."¹⁹ The Circuit Court of Appeals affirmed this

¹⁹The reason given by the District Court was (R. 142):

"The said Bonds were on June 5, 1933, payable in money of the United States and the said Joint Resolution on that date directed that all obligations then so payable should be discharged upon payment dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts. This declaration of the public policy of the United States may not be avoided or defeated by a subsequent purported election to receive payment in a currency other than money of the United States."

holding by implication, at least, when it said that the meaning of the word "payable" as used in the Resolution was "crucial" (R. 249; 98 F. [2d] at 163), and went on to hold that the guilder option in these bonds was unenforceable.²⁰

The attempted distinction between an option for the payment of guilders and an absolute, non-alternative contract to pay guilders in Holland is, we submit, palpably unsound. If a simple guilder contract is valid and enforceable, as the respondents concede and as the court below implied, then *a fortiori*, a mere option or firm offer to pay guilders, as part of a more general contract, should also be beyond the possibility of attack. The Joint Resolution, its history, and its interpretation by this and other courts reveal that there can be no substantial distinction under the Joint Resolution between a guilder contract and a guilder option. Neither falls within the purview of the Joint Resolution. It is only by a forced, unnatural construction of certain words in the Joint Resolution, divorced from their context and from the purpose of the Resolution as a whole, that an option to receive payment in guilders can be claimed to fall within the Joint Resolution. It will be seen that, even if the language of the Resolution could be so mutilated, still the fact would

²⁰The necessary steps in the reasoning of the Circuit Court of Appeals are not fully revealed by its opinion. When, however, it described the word "payable" as used in the Resolution as "crucial", it necessarily meant that if these bonds were "payable" in money of the United States on June 5, 1933, as the District Court held them to be, then the District Court's holding that the option for guilders in these bonds became inoperative on that date should be affirmed. The contention of the respondents that the validity of the guilder option depends upon the meaning of the word "payable" will be subsequently considered in detail.

remain that a claim based upon a contract to pay guilders, such as that involved herein, falls within neither the letter nor the spirit of the Resolution.

We shall show first, that neither an option nor a straight contract for the payment of guilders constitutes the evil which Congress attempted to remedy in the Joint Resolution, and second, that the language of the Resolution cannot be construed so as to prevent the enforcement and exercise of the guilder option in these bonds or the enforcement of the absolute contract for guilders resulting from the election to receive payment in that currency.

A. The foreign currency clauses in these bonds are not within the evil struck at by the Joint Resolution.

That traditional gold clauses in obligations payable in money of the United States were the only evil which Congress sought to remedy in the passage of the Joint Resolution is conclusively demonstrated by a reading of the Resolution itself, by considering it in the light of the circumstances under which it was passed, and by an examination of the cases in which the Resolution has been construed and applied.

1. The text of the Resolution unambiguously discloses that the sole purpose of Congress was to nullify traditional gold clauses in obligations payable in money of the United States.

The motive of Congress in passing the Joint Resolution, the purpose of the Resolution, and the limited scope which Congress intended to give it are all set forth without am-

biguity in the Resolution itself. A mere look at the Resolution should completely establish that it is confined to gold clauses in contracts calling for payment in money of the United States, and that it can have no bearing whatsoever upon a contract, whether alternative or absolute, for the payment of foreign currency in a foreign country. The title "Joint Resolution to assure uniform value to the coins and currencies of the *United States*" sufficiently negatives the existence of any purpose to cover contracts or clauses calling for the payment of money other than that of the United States. The preamble further discloses the limited purpose and scope intended. Those conditions and determinations that motivated Congress in the passage of the Resolution and the specific subject intended to be covered by the Resolution are described with particularity in the preamble as follows:

"Whereas the holding of or dealing in *gold* affect the public interest, and are therefore subject to proper regulation and restriction; and

Whereas the *existing emergency* has disclosed that provisions of obligations which *purport* to give the obligee a right to require payment in *gold* or a particular kind of coin or currency of the *United States* or in an amount in money of the *United States* measured thereby, obstruct the power of the Congress to regulate the value of the money of the *United States*, and are inconsistent with the declared policy of the Congress to maintain at all times the equal power of *every dollar*, coined or issued by the *United States*, in the markets and in the payment of debts,..."

Thus Congress singled out "the holding of or dealing in *gold*" as the particular subject affecting the public in-

terest that required proper regulation and restriction; it found that the traditional gold clause or "provisions of obligations [payable in money of the United States] which purport to give the obligee a right to require payment in gold or a particular kind of coin or currency of the United States, or in an amount in money of the United States measured thereby" obstruct and interfere with the power of Congress and its established monetary policy. There is no mention of foreign money contracts, whether contained in separate instruments or in the same instrument with a gold clause.

The operative provisions of the Resolution also confine its effect to the nullification of gold clauses and affirmatively preserve the remainder of the contract or obligation. Because of the findings and determinations recited in the preamble, Congress resolved in Section 1 of the Joint Resolution,

"That (a) every provision contained in or made with respect to any obligation which purports to give the obligee a right to require payment in gold or a particular kind of coin or currency, or in an amount in money of the United States measured thereby, is declared to be against public policy; and no such provision shall be contained in or made with respect to any obligation hereafter incurred. Every obligation, heretofore or hereafter incurred, whether or not any such provision is contained therein or made with respect thereto, shall be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts. Any such provision contained in any law authorizing obligations to be issued by or under authority of the United

States, is hereby repealed, but the repeal of any such provision shall not invalidate any other provision or authority contained in such law."

In order to make assurance doubly sure Congress further resolved:

"(b) As used in this resolution, the term 'obligation' means an obligation (including every obligation of and to the United States, excepting currency) payable in money of the United States; and the term 'coin or currency' means coin or currency of the United States, including Federal Reserve notes and circulating notes of Federal Reserve banks and national banking associations."

Congress could not have stated more emphatically that its sole object was to nullify the traditional gold clause. To avoid any possibility of misunderstanding, it fully described such a clause, first in the preamble and again in paragraph (a) to Section 1. Congress was, moreover, cautious to the point of redundancy in announcing to the public that it was concerned only with such traditional gold clauses when they were contained in or made with respect to obligations payable in *money of the United States*. Manifestly it was in such a situation, and no other, that gold clauses could affect or disturb "the equal power of every *dollar*, coined or issued by the United States, in the markets and in the payment of debts". Even within the limits of contracts for the payment of United States money, Congress was careful to reserve inviolate every other provision or clause in or with respect to obligations except the gold clause. Thus, in the second sentence of paragraph (a) of Section 1 Congress affirmatively provides that obligations with gold clauses

shall not be rendered void in their entirety, but that they "shall be discharged" by the debtor who shall be compelled to pay the full dollar amount of the obligation in legal tender dollars. And in the next sentence, Congress, though repealing all previous laws authorizing the inclusion of gold clauses in obligations of the United States, specifies that "the repeal of any such provision shall not invalidate any other provision or authority contained in such law".

The simple answer to any contention that the foreign currency clauses in these bonds and coupons constitute an evil which Congress sought to cure by the passage of the Joint Resolution is that the Resolution contains no statement or implication to that effect. One would naturally suppose that the lack of any mention of multiple currency clauses or of foreign money contracts by Congress would conclusively establish the absence of any purpose on the part of Congress to invalidate them. No condemnation by Congress of multiple currency clauses or of simple contracts for the payment of foreign money can, however, be found within the four corners of the Resolution. Although the Joint Resolution may be ambiguous in other respects, it is not ambiguous in so far as foreign money contracts are concerned, for it completely fails to mention them. And in the absence of ambiguity, we can see no basis for looking outside of the Resolution in order to determine what other matters Congress might be deemed to have intended to cover by language which embraces no other matters.

2. Any permissible doubt as to the limited purpose of the Resolution is dispelled upon consideration of its legislative history and the circumstances surrounding its passage.

Despite the fact that no mention of foreign currency clauses may be found in the Resolution, the Circuit Court of Appeals was unable to hold that "the Resolution is, as to the matter here, unambiguous" (R. 249; 98 F. [2d] at 163). The respondents, moreover, attempted below to establish a purpose in the Resolution to nullify foreign currency clauses by referring, not to the Resolution itself, but to the economic and political events that gave rise to the legislation, and by speculating on the basis of those events as to whether or not Congress entertained the purpose of outlawing foreign money alternatives when it nullified the gold clause. We doubt whether it is either permissible or necessary to speculate as to whether Congress intended to hit foreign currency clauses when it passed the Joint Resolution.

Nevertheless an examination of the legislative setting of the Resolution and of the debates in Congress concerning its passage would, if permissible, merely corroborate and fortify the conclusion that Congress had no intent or purpose to interfere with contracts calling for payment in foreign currencies when it determined to legislate against the gold clause.

So far as we have been able to discover, Congress never even considered the advisability of treating foreign money contracts in the same manner that it prescribed for the traditional gold clause in obligations payable in money of the United States. In the extensive debates on the Joint Resolution (77 Cong. Rec., 73d Cong.; First Sess., pp. 4528-4563, 4889-4929) one fails to find a single reference to multiple currency clauses. Nor does it appear that such clauses were considered in any of the other legislative and

executive acts that took effect or were in contemplation during the period when the Joint Resolution was being considered by Congress. In the only committee report on the Joint Resolution (H. R. Rep. No. 169, 73d Cong., First Sess.) neither multiple currency clauses nor contracts for the payment of foreign money are mentioned.

That Congress, however, "was fully cognizant of the fact that the depreciation of the dollar would raise the comparative value of commodities and of foreign exchange is shown by the occasional reference to that fact in the debates on the Joint Resolution. Thus Senator Fletcher, in charge of the passage of the Resolution in the Senate, when informed that the dollar had already depreciated 20% "as measured by foreign governments" replied (77 Cong. Rec. *supra*, at 4893):

"There is an embargo on the export of gold and the Senator would not spend that money in foreign countries anyway."

Then, in reply to the statement that the farmers of this country who send their products abroad would get less money than they ever got before, Senator Fletcher replied:

"On the contrary, they will get more and are getting more, and they will get more still. *The effect will be to increase the prices of the commodities*"

Subsequently, when the result of the devaluation of the dollar was being debated, the following colloquy took place (77 Cong. Rec., *supra*, at 4897):

"Mr. Reed. The Senator asks the result. Its immediate result will be just as it has been of recent

days, to drive down the gold value of United States currency. We have seen that in the foreign exchange quotations of the world. The dollar has been weakened and is pronouncedly weaker in its gold-purchasing power, since this measure was introduced by the administration in the House of Representatives.

Mr. Barkley. Has there not been a corresponding increase in the value of commodities?

Mr. Reed. Of course.

Mr. Barkley. Is not that one of the objects of the effort to bring about a restoration of commodity prices?

Mr. Reed. Of course."

Reference was made on the same page to the fact that Americans in foreign service had made urgent appeals because their salaries when translated into foreign money were not sufficient to give them the barest livelihood.²¹ Senator Wheeler who was a strong supporter of the Resolution replied:

²¹Congress made express recognition of the increased costs which dollar devaluation would impose upon American nationals having foreign currency obligations. The Act of March 26, 1934, 48 Stat. 466, authorized annual appropriations

"to meet losses sustained on and after July 15, 1933, by officers, enlisted men, and employes of the United States while in service in foreign countries due to the appreciation of foreign currencies in their relation to the American dollar"

Act of May 30, 1934, 48 Stat. 817, 824, \$7,438,000 was appropriated for this purpose for the fiscal year ending June 30, 1935.

"We went off the gold standard because practically every country in the world had depreciated its currency, and consequently our world trade was being wrecked by reason of those countries going off the gold standard."

The effect of the previous embargo on the exportation of gold from the United States on the value of the dollar in the terms of foreign currency and on the value of commodities in world markets was again alluded to at pages 4898-9. Senator Kean at page 4899 referred to the fact that the devaluation of the dollar would "relieve the foreign governments of a part of their debt" to the United States. And Senator Borah, in arguing that the Joint Resolution was constitutional, repeatedly emphasized that it was confined to contracts requiring the payment of dollars and did not extend to commodity contracts. For example at page 4901 he said:

"I am not discussing now a commodity contract; I am discussing a contract to pay dollars."

And again at page 4902 he said:

"I am not to be confused by treating these contracts as contracts to deliver a commodity: they are contracts to pay money, and Congress may control them, because they are contracts to pay money."

It is clear from these and other remarks in the Congressional Record that, in passing the Joint Resolution, Congress by no means intended to counteract the depreciation in the value of the dollar as compared to commodities and foreign money, even though it was well aware of the fact that the comparative value of the dollar was rapidly declining at that time. On the contrary, it is evident that

Congress actually desired the dollar to depreciate in terms of foreign money and in terms of commodities, and that the dollar was deliberately devalued by legislation *in pari materia* with the Joint Resolution. See *Norman v. Baltimore & Ohio Railroad Co.*, 294 U. S. 240, 295. Inasmuch as the resolution was but a step in the devaluation of the dollar and the demonetization of gold, effected by the series of measures described in the *Norman* case, it is inconceivable that Congress could have intended to destroy the object of its own monetary policy by extending the Joint Resolution to foreign money contracts, which are in substance commodity contracts (pp. 29-32 above).

Yet another reason why Congress did not condemn multiple currency clauses when it passed the Joint Resolution was that such clauses have never threatened or interfered with any monetary policy established by Congress. It was the *volume* of outstanding gold clauses in the year 1933, and the *scarcity of gold*, that created the emergency which in the eyes of Congress called for the passage of the Joint Resolution. The Resolution itself, together with the other contemporaneous legislative measures, was directed at the crisis resulting from the unnatural demand for gold. The debates in the House and in the Senate with respect to the passage of the Joint Resolution abound with the argument that the available gold in the United States was, in 1933, insufficient to meet the demands that might arise under outstanding gold clauses. The Committee on Banking and Currency of the House in its report on the Joint Resolution (H. R. Rep. No., 169, 73d. Cong., First Sess.) states that "the resolution is intended to accomplish three purposes" and presumably no others. The only purposes enumerated were:

"(1) It declares that the clauses in public and private obligations *stating that they are payable in gold or a specific coin or currency* [of the United States] are contrary to public policy; (2) it provides that obligations, public and private, *expressed to be payable in gold or in a specific coin or currency, may be discharged dollar for dollar in legal tender.* It also provides that no future obligations, public or private, *shall be expressed as payable in any specific coin or currency*; (3) it makes certain technical amendments to the Thomas amendment which are necessary to carry out the intention of that legislation regarding what shall be legal tender in the United States."

The Committee then continued:

"1. The occasion for the declaration in the resolution that the gold clauses are contrary to public policy arises out of the experiences of the *present emergency.* *These gold clauses* render ineffective the power of the Government to create a currency and determine the value thereof. *If the gold clause applied to a very limited number of contracts and security issues, it would be a matter of no particular consequence, but in this country virtually all obligations, almost as a matter of routine, contain the gold clause.* In the light of this situation *two phenomena which have developed during the present emergency* make the enforcement of the gold clauses incompatible with the public interest. The first is the tendency which has developed internally to *hoard gold*; the second is the tendency for *capital to leave the country.* Under these circumstances no currency system, whether based upon gold or upon any other foundation, can meet the *requirements of a situation in which many billions of dollars of*

securities are expressed in a particular form of the circulating medium, particularly when it is the medium upon which the entire credit and currency structure rests."

representative Steagall who steered the Resolution through the House, supplemented the Committee's Report with its support by arguing that "contracts that have been made payable in gold are impossible of fulfillment" (77 Cong. Rec. at 4531. See also his remarks at 4528, 4530 and 4545). The primary and apparently the only purpose of the Joint Resolution was thus to combat the unnatural demand for gold in this country. There was in 1933 no threatened shortage or unnatural demand for foreign currency; and there is no reason to suppose that foreign currency clauses would have had any noticeable effect upon the national economy as a whole. Even if Congress had considered foreign currency clauses as an evil, of which there is no evidence, still it is apparent that Congress would have regarded them as of "no particular consequence" because they "applied to a very limited number of contracts and currency issues". Whereas in *Norman v. Baltimore & Ohio Railroad Co.*, 294 U. S. 240, 313, it was observed that "the volume of obligations with gold clauses . . . obviously had bearing upon the question whether their existence constituted a substantial obstruction to Congressional policy", and that this volume was estimated to be seventy-five million dollars or more, foreign currency options, on the other hand, do not amount to one per cent. of this sum.²²

Professor Nussbaum's article on Multiple Currency and Index Clauses²² contains a thorough analysis of other

²²Nussbaum *Multiple Currency and Index Clauses*, 84 U.

economic, social and political differences between the multiple currency options and gold clauses, pointing out among other things that there is always the possibility that the foreign currency will depreciate as much or more than the domestic currency, or that the comparative value of the domestic currency may revive by the time the bonds mature. Another material distinction is that multiple currency obligations, unlike gold clauses, "have always been undertaken with a clear understanding of their meaning and with no pressure of an actually inescapable custom" (84 U. of Pa. L. Rev. at pp. 576-7). This factor, as already noted, is present in the situation at bar, where the record shows that, before the issuance of these bonds and coupons, the Debtor made arrangements with the petitioner contemplating payment of "a fair current rate" for the guilders whenever payment in guilders should be elected (R. 172). Furthermore, the Debtor's president in his letter (summarized in the offering circular of the bonds) made specific reference to the multiple currency options in these instruments (R. 133-4, 160). There can be no question that the options were deliberately inserted in the bonds and coupons as a special inducement to purchasers, both citizens and aliens. The House Committee on Banking and Currency in its report, on the other hand, emphasized the fact that ". . . in this country virtually all obligations, almost as a matter of routine, contain the gold clause."

brief in opposition to certiorari in this case, the argument is made that only approximately ninety million dollars face amount of bonds issued by American obligors and now outstanding, have alternative provisions for payment in moneys of countries remaining on the pre-war gold standard, and that, accordingly, the question of the enforceability of multiple currency clauses is of no great public importance (pp. 17-18).

The foreign money clauses in these bonds and coupons, unlike the traditional gold clause, cannot be said to have been inserted in the instruments "as a matter of routine".

Perhaps the most material distinction in so far as the Joint Resolution is concerned between the gold clauses there prohibited, and the multiple currency clauses there unmentioned, is found in the relative bearing of settled constitutional principles. That the Constitution of the United States would not permit a construction of the Joint Resolution so as to include the guilder option in these bonds and coupons is a point which will be subsequently enlarged. Without extended discussion, however, it will be apparent that the reasons assigned by this Court in the *Norman* case for sustaining the Resolution as applied to the gold clause in private contracts requiring payment of money of the United States, are inapplicable to multiple currency clauses. Whereas Congress unquestionably believed that the elimination of gold clauses from such contracts came within its power to remove substantial obstacles to the monetary policy it had established, there is no indication that Congress found in multiple currency clauses any obstruction, however slight, to the fulfillment of that policy. Whereas gold is concededly the very basis upon which the currency of this country is based, and is therefore subject to the control of Congress, a contract to pay foreign money in a foreign jurisdiction is, *prima facie*, beyond the territorial and constitutional powers of Congress. Congress may well have questioned whether its power over contracts for the payment of foreign money was any greater than its power over other commodity contracts, which as the Congressional debates show, Congress understood to lie well beyond its regulatory power.

Accordingly the Resolution itself and the circumstances surrounding its passage affirmatively establish that the sole purpose of Congress in passing the law was to nullify the gold clauses so generally present in obligations payable in money of the United States, and that for numerous sufficient reasons it had no desire or purpose to interfere with foreign money clauses, such as those contained in these bonds and coupons.

3. *The claim for guilders is not within the purpose of the Joint Resolution merely because it is greater in amount than a claim for dollars would have been.*

The courts below refused to confine the Joint Resolution to its sole intended purpose of nullifying gold clauses, because of an apparently strong belief on their part that the Resolution, even though it does not so provide, should be construed to prevent anyone from acquiring an "advantage" or "premium" as a result of the devaluation of the dollar. This is shown by the statement of the Circuit Court of Appeals (R. 253; 98 F. [2d] at 165-6):

"Thus by running around an international stump—passing through Holland en route—the holder of every bond and coupon *enriches* himself substantially at the *expense* of the debtor and of other creditors"

Such a result would be squarely within a situation *similar* to that expressed by the Chief Justice in outlining the effect of devaluation of the dollar. (*Norman v. B. & O. R. Co.*, 294 U. S. 240, 315.) Clearly, such a result so reached would interfere with the purpose of the Joint Resolution In short, the evil sought to be avoided by the Resolution is accomplished by a form of indirection, and to

that extent, the purposes of the Resolution and, therefore, the Resolution itself defeated. We think such a result brings these instruments within the intendment of the Resolution and within the ambiguous expressions, set out hereinabove, of the Resolution."

In other words, the court assumed that the result of the enforcement of the guilder claim in these bonds and coupons was one prohibited by the Joint Resolution. As we have previously demonstrated (pp. 16, 22-32 above) this assumption of the court was based largely, if not entirely, upon a misapprehension as to the nature of the claim for guilders which the petitioner seeks to enforce and as to the nature of the option for guilders upon which the claim is predicated. The guilder option in these bonds is not the equivalent in law or in fact of a promise to pay in gold coin of the United States of the weight and fineness of January 1, 1912, as the court below erroneously conceived it. That the result of the guilder claim happens in this case to be practically the same in amount as a claim for gold dollars of the 1912 standard would have been, cannot of itself bring the guilder claim within the evil of gold clauses.

The Joint Resolution is not directed against any particular result, but is aimed solely at a particular type of clause when it appears in obligations payable in money of the United States. It does not provide that gold clauses or any other clauses similar in result or in effect, are against public policy, but limits itself to gold clauses, and strikes them down regardless of what their result may be. The Circuit Court of Appeals itself held this to be the fact when it concluded after an examination of the Resolution (R 251-98 F. [241-164]).

"In short, the evil struck at by the Resolution was contract provisions purporting 'to give the obligee a right to require payment in gold or a particular kind of coin or currency of the United States, or in an amount in money of the United States measured thereby'—as defined in paragraph (b), 'payable in money of the United States.'"

Even according to the court below, therefore, the single evil struck at by the Joint Resolution was the traditional gold clause in contracts payable in money of the United States, whatever the effect of such a clause might prove to be in a particular case.

Nor can it be said, as the court below held, that the foreign currency alternatives in these bonds and coupons "accomplished by a form of indirection" the evil sought to be avoided by the Resolution (R. 253; 98 F. [2d] at 166). These clauses were inserted in the bonds without any view to defeating the purpose of the Joint Resolution. This the court below undoubtedly recognized when it said (R. 252; 98 F. [2d] at 165):

"The provision [for payment in foreign money] may or may not have had an *entirely proper* business purpose . . . But it is the effect and not the purpose which is important."

The effect, however, did not materialize until more than twenty years after the bonds were executed, and there is no evidence that it was or might have been foreseen by the parties. There could have been no attempt to evade the Joint Resolution when the guilder alternatives were placed in these instruments some twenty years before the Resolution became law, and accordingly no doctrine related to

evasion can be applied retroactively to destroy the contract right granted to the holders of these bonds and coupons when they were issued in 1912. If Congress had desired retroactively to destroy the foreign currency alternatives in these bonds, it would have employed language directly and unmistakably adapted to that purpose. Contract rights, such as the right to be paid in guilders, cannot be destroyed by mere implication founded upon the assumption that their effect is similar to that of the gold clause upon which Congress found it necessary to place an explicit ban. *Shwab v. Doyle*, 258 U. S. 529, 534; 2 Sutherland, Statutes and Statutory Construction (2nd Ed., 1904) Section 589.

The courts below attempted to place upon this Court the responsibility for their conclusions that the mere result of the guilder claim was enough to bring it within the condemnation of the Joint Resolution. Thus the Circuit Court of Appeals said with respect to the result that would follow the enforcement of the guilder option in these bonds and coupons (R. 253; 98 F. [2d] at 165-6):

"Such a result would be squarely within a situation similar to that expressed by the Chief Justice in outlining the effect of devaluation of the dollar (*Norman v. B. & O. R. Co.*, 294 U. S. 240, 315)."

The court had previously said (R. 250; 98 F. [2d] at 163):

"We find ourselves in somewhat the situation presented in *Holyoke Water Power Co. v. American Writing Paper Co.*, 300 U. S. 324 . . . where the Court was driven to determine the construction and application of this Resolution by resort to considerations of 'the evil to be remedied' . . . and whether the particular contract provision involved there was within the evil."

Indeed, every opinion holding that multiple currency options fall within the Joint Resolution, purported to follow the construction given to that statute by this Court.²³

Neither the *Norman* case nor the *Holyoke* case, as we read them, extended the Joint Resolution beyond the nullification of gold clauses or even suggested that it could be so extended. Inasmuch as both cases involved gold clauses within the express letter and declared purpose of the Joint Resolution, anything said in the opinions was necessarily directed to gold clauses and to nothing else.

It is true that in the *Norman* case this Court, in holding that the Resolution was constitutional even as applied to "gold value" clauses, referred (294 U. S. at 315) to the undesirable economic consequences that would result throughout the nation if the tremendous number of gold clauses should be enforced according to their terms. In this connection it was pointed out that, although the States, municipalities, public utilities and private corporations would receive their income according to a new standard, their "gold bonds" outstanding would compel them to pay their creditors in accordance with the old, more burdensome standard. In this observation addressed to the reasonable

²³See *City Bank Farmers Trust Co. v. Bethlehem Steel Co.*, 244 App. Div. (N. Y.) 634 (1935) at 635-6; *Zurich General Accident & Liability Ins. Co., Ltd., v. Lackawanna Steel Co.*, 164 Misc. (N. Y.) 498 (1937) at 502, affirmed without opinion 254 App. Div. 839 (1937), reversed — N. Y. — on January 11, 1939 (see Appendix A, pp. 99-102 below). The District Court, it will be remembered, held that the decision of this Court in the *Holyoke* case in effect overruled the decision of the Circuit Court of Appeals for the Second Circuit in *Anglo-Continental Treuhander, A.G. v. St. Louis Southwestern Railway Company*, 81 F. (2d) 11, where a guarantor claim on these very bonds and coupons was enforced.

ness and constitutionality of the Congressional action in expressly nullifying gold clauses, one is unable to find the slightest implication that any other clause, requiring debtors to pay their obligations according to a pre-1933 standard, would be invalid.²⁴ If Congress had regarded the multiple currency clauses as falling within the same category as gold clauses, it could easily have expressed itself to that effect. And in the *Norman* case this Court did not attempt to decide whether contracts having the same effect as gold clauses are or should have been prohibited by the Joint Resolution, but left this question for Congress to determine.²⁵

Nor is there any indication in *Holyoke Water Power Co. v. American Writing Paper Co.*, 300 U. S. 324, that

²⁴It is elementary that the language of the Court must be limited by the circumstances in which it was used. *Taylor v. Voss*, 271 U. S. 176, 184 (1926). The New York Court has well said: "The language of any opinion must be confined to the facts before the court. No opinion is an authority beyond the point actually decided, and no judge can write freely if every sentence is to be taken as a rule of law separate from its association." *Dougherty v. Equitable Life Assurance Society*, 266 N. Y. 71, 88 (1934).

²⁵Thus, for example, the Legal Tender Cases were distinguished by the Court in the *Norman* case on the ground that in those cases there had been no express prohibition of gold or specie contracts by Congress, such as the express prohibition of such contracts in the Joint Resolution (294 U. S. at 307). Nevertheless, the Court fully recognized that the gold and specie contracts upheld in the Legal Tender Cases imposed upon the debtor an increased burden and gave the creditor an advantage over other creditors who held contracts payable in legal tender. Cf. *Bronson v. Rodes*, 7 Wall. 229; *Butler v. Horwitz*, 7 Wall. 258; *Dewing v. Sears*, 11 Wall. 379; *Trebilcock v. Wilson*, 12 Wall. 687; *Thompson v. Butler*, 95 U. S. 694; *Gregory v. Morris*, 96 U. S. 619. See also *The Vaughn & Telegraph*, 14 Wall. 258; *The Emily Souder*, 17 Wall. 666.

the Joint Resolution extends to any contract that might prove burdensome to the debtor or that might have the same effect as a gold clause contract. Although that case involved a contract containing two alternatives, both branches were prohibited by the Resolution and, accordingly, the entire transaction was held to constitute the very evil against which the Resolution was directed. The Resolution, as construed and applied in that case, could not possibly include within its scope the present claim for guilders. As the Court said (pp. 338-9):

"The Resolution touches gold as well as coin or currency [of the United States] whenever transactions in either are within the evil to be remedied. We learn from the preamble that 'provisions of obligations which purport to give the obligee a right to require payment in gold or a particular kind of coin or currency of the United States, or in an amount in money of the United States measured thereby, obstruct the power of the Congress to regulate the value of the money of the United States, and are inconsistent with the declared policy of the Congress to maintain at all times the equal power of every dollar, coined or issued by the United States, in the markets and in the payment of debts. Accordingly, all such provisions are declared to be against public policy, and every obligation, heretofore or hereafter incurred, though it contain such provisions, shall be payable, dollar for dollar, in legal tender at the time of payment. Transactions for the sale or delivery of gold for industrial purposes are not within the evil to be remedied, and so are not within the statute. . . . An obligation to make delivery upon a *bona fide* sale is not fairly to

be classified as an obligation payable in money" (Joint Resolution, subdivision (b)), or so we now assume. But very definitely, the evil does include transactions whereby gold, coined or uncoined, is to be delivered in satisfaction of a debt expressed in terms of dollars, payment, not sale, being then the end to be achieved. As definitely, indeed more obviously, the evil includes transactions whereby a debt is to be discharged, not in bullion, but in dollars; if the number of the dollars is to be increased or diminished in proportion to the diminution or the increase of the gold basis of the currency. Both forms of obligation are illustrations of the very mischief that Congress sought to hit."

For these reasons, it was held that a lease calling for payment as rent of "a quantity of gold which shall be equal in amount to Fifteen Hundred (\$1500.00) Dollars of the gold coin of the United States of the standard of weight and fineness of the year 1894, or the equivalent of this commodity in United States currency", not only fell within the letter of the Resolution, but also constituted the very mischief that Congress sought to hit. In substance the only question before the Court was whether the lease before it was a commodity contract, and therefore not within the evil of the Resolution, although prohibited by its letter, or whether it was a money contract. After observing that the obligor had the option of paying the equivalent in dollars instead of gold, that the only measure of the liability was the dollar value of the gold, at the time of payment, this Court held that the alternative forms of payment "shed light upon each other" and that the contract was clearly one for the payment of money.

The distinctions between the multiple currency options in the present bonds and the alternatives considered in the *Holyoke* case are decisive. Whereas in the *Holyoke* case each of the alternatives was prohibited by the language of the Resolution, here four out of five alternatives in the bonds are not prohibited; whereas there the obligor had the right to elect which alternative he would perform, here he has expressly surrendered that right; whereas there the obligation of payment was measured by gold coin of the United States at the time of payment, here the amounts promised are not so measured at the time of payment. As we have seen (pp. 24-32 above), the foreign currency amounts promised in these bonds were the equivalent of a thousand dollars in gold coin of the United States on January 1, 1912, as of which date the bonds were issued, but that equivalence ceased upon that date, and the amounts promised fluctuated thereafter, as foreseen, in accordance with the variations in foreign exchange and the alterations of the monetary policies of the foreign countries in which the payment was to be made.

Clearly then, there is no conflict between the construction given the Joint Resolution in the *Holyoke* case and that given to it in the cases where the Joint Resolution was held inapplicable to multiple currency clauses. *Anglo-Continental Treuhand, A. G. v. St. Louis Southwestern Railway Company*, 81 F. (2d) 11, cert. den. 298 U. S. 655; *McAdoo v. Southern Pacific Co.*, 10 F. Supp. 953, rev. on other grounds, 80 F. (2d) 121; and *Zurich General Accident & Liability Insurance Company, Ltd. v. Bethlehem Steel Company*, — N. Y. —, January 11, 1939 (Appendix A, pp. 99-102 below). A concise statement as to

Why multiple currency options do not fall within either the letter or the spirit of the Joint Resolution was given by Judge Hand in the *Anglo-Continentale* case, 81 F. (2d) 11, at page 12:

"They are within the resolution only in case its terms cover them, which they do not. It only proscribes a 'provision' which 'purports to give the obligee a right to require payment in gold or a particular kind of coin or currency, or in an amount in money of the United States measured' by either. Since, as we have seen, the promise to pay guilders did not 'purport . . . to require payment in gold,' the resolution does not hit it."

and in conclusion he said (p. 13):

"There is a limit to the power of courts to mould the language of a statute in the interest of even the clearest immanent purpose; and we are not here certain of the existence of such a purpose."

The same view was taken in the *McAdoo* case in an opinion expressly approved in the *Anglo-Continentale* case 81 F. [2d] at 13. In that case, District Judge Lindley, after pointing out that the Resolution was confined to the gold clauses therein described, when contained in obligations payable in money of the United States, continued (p. 954):

"The bar of illegality, by its own terms, is defined and limited in effect. Congress was dealing with contracts calling for payment in gold coin of the United States; not with contracts payable in money of foreign countries. The preamble of the resolution so indicates. If we give full force and effect to the unambiguous language employed, we are unable to point out any words that disclose any

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intent to extend the prohibition further than that language clearly indicates. Consequently, the rights and liabilities of the parties in the contracts under consideration, not being within the legislation, are the same as if the resolution had never been adopted."

He then cited decisions of this Court establishing that, but for the Joint Resolution, the foreign money contract would be legal and enforceable, and went on to say:

"Until the Congress shall attempt to extend the power heretofore exercised to contracts calling for payment in foreign money, it is futile for the court to enter upon any exposition of the propriety of such action."

Perhaps the most thorough and closely reasoned discussion of the entire subject of the relation between multiple currency clauses and the Joint Resolution is found in the dissenting opinion of Merrell, J., in *City Bank Farmers Trust Co. v. Bethlehem Steel Co.*, 244 App. Div. (N. Y.) 634 (1935). The opinion of the majority of the judges of that court, holding that coupons of the Bethlehem Steel Company containing multiple currency options were required by the unexpressed "legislative intent" and considerations of "good citizenship" to be discharged dollar for dollar by the Joint Resolution, was rejected in the *Anglo-Continentale* case (81 F. [2d] at 13), and the conclusion reached in the latter case has now been adopted by the New York Court of Appeals in the *Zurich* case.²⁶

²⁶Reprinted in full in Appendix A, pp. 99-102 below.

B. Selected language of the Joint Resolution cannot be construed, in disregard of the clear purpose of the Resolution as a whole, so as to destroy the guilder option in these bonds.

Inasmuch as there was clearly no purpose on the part of Congress to nullify foreign money contracts, whether found in separate instruments or in conjunction with gold clauses, it is impossible to follow the holding of the Circuit Court of Appeals that the present claim for guilders is barred by the Joint Resolution.

Difficult as it is to understand the inconsistencies in the opinion of the court, the most likely explanation is that, following the District Court, it held these bonds and coupons to be "obligations payable in money of the United States" within the meaning of the second sentence in the Joint Resolution which provides that such obligations "shall be discharged" dollar for dollar in legal tender. In other words, it interpreted the Resolution as covering any instrument containing a dollar promise and as requiring that every other promise in the instrument shall be discharged upon the payment of the dollar promise in legal tender dollars. This was the construction urged upon the courts below by the respondents and adopted by the District Court in its conclusion of law No. 6 (R. 142).

Many fallacies underlie this construction of the language of the Resolution. In the first place, it gives to the phrase "obligations payable in money of the United States" an inaccurate, unnatural and unworkable meaning. In the second place, it interprets the phrase "shall be discharged" as requiring the discharge of the dollar promise in the in-

strument on or as of June 5, 1933, even though no promise in the instrument had matured on or before that date. In the third place, this construction necessitates a complete disregard of the declared purpose and clear intent of the Resolution, construed as a whole.

1. *The bonds and coupons were never "obligations payable in money of the United States" within the meaning of the Resolution.*

In holding that these bonds and coupons are "obligations payable in money of the United States" both courts below assumed that the word "obligation" means the instrument and not the debt it evidences and that the word "payable" means a contingent and not a fixed duty to pay. It is only by such a definition of the words "obligations" and "payable" that they can possibly cover these bonds and coupons, for there was never any obligatory duty on the part of the Debtor to pay these bonds and coupons in dollars. The duty of the Debtor to pay dollars was merely contingent, depending upon an election of the bondholder to receive dollars; and in the absence of any such election on the part of the bondholder, the Debtor's dollar liability never materialized. Accordingly, unless "obligation" means the instrument and not the duty, and unless the word "payable" means a contingent or hypothetical, but not absolute duty to pay, then these bonds were never "obligations payable in money of the United States".

The primary meaning of "obligation" is "duty". *Bouvier's Law Dictionary*. The word "obligation" may in certain instances be used as a description of the instrument as well as the debt or duty which it represents. It does not

follow that it can be used only in such a limited and secondary sense in the Resolution merely because, as the respondents have contended, this Court, in *Norman v. B. & O. R. Co.*, 294 U. S. 240, 313, referred to "the volume of obligations with gold clauses" and the "outstanding obligations with gold clauses". The opinion in that case reveals that the Court was not attempting to construe the word "obligation" but was merely employing it as a synonym for the word "bonds". Although these bonds and coupons are undoubtedly "obligations" in this one sense of the word, they are not "obligations payable in money of the United States" under any reasonable interpretation of the Joint Resolution.

Just as the word "obligation" may have more than one meaning, so also the word "payable" is not always to be confined to a single meaning. Under some circumstances it may perhaps mean no more than capable of being paid upon the happening of some future event or contingency. This was the meaning given to the word by both courts below. On the other hand, where the word is used in commercial transactions, such as that involved here, it means the absolute, non-contingent duty of payment. In *Ingram v. Mandler*, 56 F. (2d) 994, 997 (C. C. A. 10, 1932) it was said:

"The word payable, when used in connection with commercial transactions, means that which is to be paid rather than that which may be paid."

The language of the Missouri court in *Swanson v. Spencer*, 177 Mo. App. 124, 129, 163 S. W. 285, 286 (1914), is of special interest in interpreting the contract of a Missouri corporation:

"The word 'payable', when used in business transactions, means that which is to be paid, rather than that which may be paid. 6 Words and Phrases, 5246. A debt is payable *whenever the debtor has the right to pay it*, regardless of whether the time has arrived when the creditor may have his action upon it."

The debt represented by the bonds in this cause did not, within the definition of the Missouri court, become payable in any currency until maturity and until petitioner had elected the currency of payment, because prior to that time, under the express provisions of the mortgage and bond, the Debtor had no right to pay. The bonds were not "payable" in United States money in the absence of an election to receive it.²⁷

Thus the natural and most reasonable meaning of the phrase "obligations payable in money of the United States" as used in the Resolution is "debts to be paid in money of the United States". This was the construction given the phrase in the *Holyoke* case (302 U. S. at 339-340) and in the Congressional debates and the House Report on the Resolution. The House Committee on Banking and Currency, in its Report No. 169, 73d Cong., First Sess., entertained no doubt about the scope of the Resolution. The Committee regarded it as being confined to

"... obligations *stating that they are payable in gold or a specific coin or currency [of the United States]*"

²⁷Note in 49 Harv. L. Rev. 153 (1935). See also 87 U. of Pa. L. Rev. 232 (1938).

obligations

" . . . *expressed to be payable in gold*" etc.,

and as providing that

" . . . no future obligations . . . *shall be expressed as payable in any specific coin or currency [of the United States]* . . . "

The analysis of the Resolution by Representative Steagall, Chairman of the Committee sponsoring the Resolution in the House was even plainer. He said (77 Cong. Rec. at 4902):

"This resolution declares that contracts *requiring the discharge of obligations solely* by payments in gold are contrary to public policy; that hereafter no *such* contracts may be made and that all *such* contracts now in existence or that may hereafter exist shall be payable in lawful money of the United States."

Also Senator Borah, as quoted above at page 56, repeatedly emphasized the fact that the Resolution applied to . . . a contract *to pay* dollars . . . " See 77 Cong. Rec. 4901-4902. As to such debts, the second sentence in the resolution provides that they shall be discharged upon the payment of one legal tender dollar for every dollar which the Debtor is required to pay under his debt.

If "obligation" is given its natural meaning of the *duty or liability* evidenced in the instrument, then there was no duty of the Debtor that could possibly be discharged "dollar for dollar", because a duty in terms of dollars was never incurred. The second sentence of the Resolution does not speak of "obligations" generally but solely of "every obliga-

tion, heretofore or hereafter *incurred*". One does not ordinarily incur an instrument; but one does incur a liability or a duty. Thus, although the word "obligation", standing alone, might conceivably mean either the instrument or the liability it represents, the word when used in conjunction with and modified by the word "incurred" can mean only the liability or duty. This was pointed out in the case of *Exchange Bank v. Ford*, 7 Colo. 314, 317. 3 Pac. 449, 451 (1884), where the court said "in interpreting the sentence "where the defendant has been guilty of fraud in contracting the debt or *incurring the obligation* for which the action is brought", etc.:

"It seems reasonably certain that the Legislature mean, when they speak of the obligation being 'incurred', a liability *affixed* by law to the fraudulent conduct mentioned. *Contracts* are either expressly made by the parties or created by implication of law; it can hardly be said that they are ever *incurred*. The *liability* is incurred when the contract is violated or the fraud committed; and when the word 'obligation' is used with reference to this liability, the obligation may also be said to be *incurred*."

Moreover the Resolution provides that the "obligation" shall be "discharged," which naturally implies that the duty or liability is to be discharged, and not merely the paper of instrument upon which that obligation is manifested. Again, the definition of the term "obligation" given in paragraph (b) of the Resolution includes "every obligation of and to the United States". Although an instrument may be considered as an obligation of the United States, it is unusual and unnatural to speak of an instrument as an obligation "to" anyone.

Accordingly in *Anglo-Continentale Treuhand, A. G. v. St. Louis Southwestern Railway Company*, 81 F. (2d) 11, *supra*, the court said (p. 12):

“ . . . it is a plausible, though to us not a persuasive argument that ‘obligation’ means the instrument itself and that the resolution therefore covers all instruments which contain a promise to pay money of the United States.”

We even question the plausibility of the argument. In its most recent decision on the Joint Resolution, this Court in *Smyth v. United States*, 302 U. S. 329, 359, 361, referred repeatedly to “the obligation of the bonds”, and thus distinguished between the instrument containing a duty to pay and the duty itself, as expressed by the word “obligation”. More specifically, in *Holyoke Water Power Co. v. American Writing Paper Co.*, 300 U. S. 324, 339-40, this Court consistently referred to the word “obligation” in the Resolution as meaning “a debt” either “expressed in terms of dollars” or “to be discharged . . . in dollars”.

The New York Court of Appeals but recently held in *Zurich General Accident & Liability Insurance Company, Ltd. v. Bethlehem Steel Company* (Appendix A hereto, at p. 100) that a claim for Swiss francs based upon an election of that currency by the holder of the multiple currency bonds of the Bethlehem Steel Company was not barred by the Joint Resolution, saying:

“On the facts of this case, the obligation was not payable in ‘money of the United States’ but in foreign currency and therefore the Joint Resolution is not applicable. The obligation might have become payable at New York in United States money, but

the fact is that it did become payable in Switzerland in Swiss currency."

Furthermore, if the words in the Resolution "obligation payable in money of the United States" are broad enough to include these bonds and coupons, even though no fixed duty to pay in money of the United States was ever incurred, then the phrase is devoid of legal significance. The provision for discharge "dollar for dollar" could only apply to an instrument or debt which is capable of discharge "dollar for dollar". For example, the debt in these bonds to pay guilders, and not dollars, could not be discharged under any hypothesis "upon payment dollar for dollar". The word "payable" must either be given its accepted meaning in commercial transactions importing a present absolute duty to pay, or else it can be ignored entirely as adding nothing that is not covered necessarily by the "dollar for dollar" provision.

2. These bonds and coupons are not now payable in money of the United States.

Even if we could assume that these bonds and coupons, contrary to the plain import of the words, constituted "obligations payable in money of the United States" at the time when they were issued and on June 5, 1933, when the Joint Resolution became law, the fact would nevertheless remain that these instruments are not now "payable" in dollars in any sense of the word. The election of guilders on September 24, 1936, converted these bonds and coupons, as we have seen, into straight guilder obligations (pp. 39-46 above). Thus, when the claim on a guilder basis was filed by the petitioner, these bonds and coupons were capable of

payment in guilders only. After the election of guilders, the Debtor was not even under a contingent obligation to perform the dollar alternative in these bonds and coupons.

We are driven to assume that both courts below construe the Resolution as requiring these bonds and coupons to be discharged on June 5, 1933, prior to their maturity and without the election of any medium of payment. The District Court held that the bonds "were on June 5, 1933, payable in money of the United States" and that "the said Joint Resolution on *that date* directed that all obligations *then* so payable should be discharged upon payment, dollar for dollar . . ." (R. 142). The Circuit Court of Appeals also had in mind the status of the bonds prior to the election of guilders and before their maturity, when it said that the "line of cleavage arises" because of the fact that the bonds when issued and prior to election were alternatively payable in gold dollars or in guilders (R. 248; 98 F. [2d] at 162). This is an impossible application of the words "shall be discharged" in the Resolution. These words must of necessity refer to the time when payment is to be made, not to June 5, 1933, when the Resolution was passed. Such is the only proper construction of the complete phrase "... shall be discharged *upon payment*, dollar for dollar, in any coin or currency which *at the time of payment* is legal tender for public or private debts".

If the phrase "shall be discharged" referred (as the courts below assumed) to the date of the passage of the Joint Resolution and not to the time of payment, the Resolution might well expose all debtors having multiple currency bonds outstanding to an immediate statutory action for the recovery of "dollar for dollar" alternatively promised at some future date, or to an immediate action for

money had and received. It cannot be that Congress intended to accelerate the maturity of all contracts with multiple currency clauses on June 5, 1933.

It is thus apparent that the second sentence of the Joint Resolution, substituting legal tender payment for the dollar amount called for in the gold clause, does not apply until the bonds have matured, until all conditions precedent have been satisfied, and until the time for payment and discharge has arrived. It is equally apparent that the word "obligation", whether referring to the instrument or the absolute debt evidenced thereby, cannot in the nature of things be discharged "dollar for dollar" unless the obligor is, at the time of payment, under a duty to pay dollars.

In conclusion, we repeat that the instruments upon which the present claim is based were never "obligations payable in money of the United States" because the option to receive payment in dollars was never exercised. After September 24, 1936, when guilders were elected, the bonds and coupons became straight contracts for the payment of guilders, just as though there had never been any alternative right to receive payment in another currency. Thus, at the time to which the second sentence of the Joint Resolution must refer, the bonds and coupons were payable in guilders only and their discharge "dollar for dollar" lay beyond the realm of possibility.

3. If the Resolution is construed as a whole and in the light of its policy, it cannot possibly cover the guilder alternative in these bonds and coupons.

If one were to accept the holding below that the Joint Resolution is mandatory and requires the discharge of every

instrument which on June 5, 1933, contained an alternative dollar promise, upon the performance of that alternative in legal tender dollars, then one would be compelled to disregard the plain purpose of the Resolution and most of its language. For, if the Resolution is so applied, it would be immaterial whether or not the instrument thereby affected contained a gold clause. According to such a construction, any instrument, whether or not it contained a gold clause, would have to be fully discharged upon the performance of the dollar alternative. The decisions of the courts below would presumably have been no different if each bond had originally contained an alternative promise for the payment of a thousand dollars in paper money instead of a thousand dollars in gold coin of the 1912 standard. So construed and applied, the Resolution has nothing whatever to do with gold clauses, but is no more nor less than a mandatory discharge, by Congressional fiat, of all contracts containing dollar promises.

If, therefore, the words "obligations payable in money of the United States" are allowed to mean what the Circuit Court of Appeals held them to mean, then the preamble to the Resolution and the first sentence of Section 1, declaring gold clauses invalid and against public policy, must be treated as mere surplusage. Furthermore, the obvious purpose of Congress to nullify gold clauses may be wholly disregarded. That the construction given to the Resolution by the courts below is untenable, should require no further demonstration. It is elementary that a statute must be construed as a whole, that its language must be read in the light of its policy and of the evils which call forth the enactment. It is significant that on the day the present case was decided by the Circuit Court of Appeals, two other

judges of the same court held that the Joint Resolution does not affect a lease requiring the payment as yearly rent of 557,280 "grains of pure, unalloyed gold" or, at the option of the lessor, \$24,000 in lawful currency of the country.

Emery Bird Thayer Dry Goods Co. v. Williams, 98 F. [2d] 166, 172.²⁸ In that case it was said with reference to the Joint Resolution:

"Congress may, of course, express itself tautologically . . . but that it has done so is a conclusion or interpretation to be avoided if fairly possible. A construction resulting in absurdity or unreasonableness should not be adopted if another construction is equally tenable."

The court below completely ignored this timely statement of the elementary principles that should be applied in the construction of the Joint Resolution. Not only did it refuse to adopt an "equally tenable" construction of that statute, but in so doing it also closed its eyes to the fact that the equally tenable construction had been authoritatively proclaimed to be the proper construction by this Court in *Holyoke Water Power Co. v. American Writing Paper Co.*, 300 U. S. 324, 338-339, and by the Circuit Court of Appeals for the Second Circuit in *Anglo-Continentale Treuhand, A.G. v. St. Louis Southwestern Railway Co.*, 81 F. (2d) 11, cert. den. 298 U. S. 655.

The absurdity of the holding below that these bonds and coupons are "obligations payable in money of the United States" and are therefore compelled by law to be discharged "dollar for dollar" in legal tender is patent on its face. If

²⁸On August 29, 1938, this case was set down for reargument, which was had December 12, 1938.

German creditor, for example, should demand payment in marks, which are far below the value of the dollar, the Circuit Court's construction would compel the Debtor to pay dollars!

It is true that the Circuit Court did not envisage a universal application of its construction of the Joint Resolution. The statement of the court at the end of its opinion that (R. 254; 98 F. [2d] at 166)

"In what has been stated above, we have had in mind the situation before us",

was perhaps motivated by a realization of the *reductio ad absurdum* that would necessarily follow the application of its construction of the Joint Resolution in other cases involving foreign money contracts. That is to say, the court took the position that the language of the Joint Resolution could be given one meaning under the present state of facts, but might have a contrary meaning under a different set of facts.

Of course, it might conceivably happen that under one state of circumstances a provision in a contract would amount to a gold clause, whereas in another it would not. For example, if it were shown that a clause had been inserted in an instrument for the express purpose of evading the ban on gold clauses found in the Joint Resolution, then there might be sufficient basis for bringing that clause within the Resolution, even though a similar clause would not, because of the absence of such circumstances, constitute an attempt to evade the policy of Congress. In each such situation, however, the language of the Resolution could be given the same meaning. And the clause that

constituted an evasion would fall within the first sentence of the Joint Resolution, invalidating gold clauses. That, as we have repeatedly stated, is not the situation here. The Circuit Court of Appeals, as we understand it, did not hold that the multiple currency clauses in these bonds came within the express condemnation of gold clauses found in the first sentence of the Resolution, but quite to the contrary, held that the second sentence of the Resolution, containing the ambiguous words "obligation payable in money of the United States", compelled the performance of the dollar alternative in these bonds and thereby defeated all other alternatives.

The possibility of giving the language of the Joint Resolution one meaning under one set of circumstances and another meaning under another was considered and rejected by the Circuit Court of Appeals for the Second Circuit in *Anglo-Continental Treuhand, A. G. v. St.-Louis Southwestern Railway Co.*, 81 F. (2d) 11. There the court denounced in unmistakable terms any construction of the Joint Resolution that would "give the same words one meaning for one set of obligees and another for another" in holding that no distinction could be drawn between the multiple currency clauses in these bonds and coupons when held by aliens and those same clauses in the hands of citizens of the United States. There it was said (p. 13):

"If the resolution did not reach bonds held by aliens when passed, it did not reach those then held by citizens; we cannot give the same words one meaning for one set of obligees and another for another. Congress either forbade the enforcement of such promises, or it did not. We will not try to recast it altogether, excepting alien obligees though

its language covers them equally with citizens. There is a limit to the power of courts to mould the language of a statute in the interest of even the clearest immanent purpose; and we are not here certain of the existence of such a purpose."

In *Compania de Inversiones Internacionales v. Industrial Mortgage Bank of Finland*, 269 N. Y. 22 (1935), cert. den. 295 U. S. 705, it was held that the Joint Resolution governed an action on a foreign bond requiring payment in gold coin of the United States, even though the creditor and the debtor were non-residents of the United States. The court observed that if the Joint Resolution were to apply to citizens of the United States but not to aliens there would (p. 27) "be inaugurated in the United States a dual monetary system, when the express purpose of the joint resolution was to have a single monetary system, where every dollar would be a parity in the payment of debts."

It is doubtful whether the Circuit Court of Appeals would have set aside an election of marks under these bonds and compelled the creditor to receive dollars, because the court regarded it as a substantial objection to the guilder claim of the petitioner that it would give certain bondholders an "advantage", that the share of the petitioner in the estate of the debtor would be more under a guilder claim than under a dollar claim. We find in the Joint Resolution nothing to the effect that a creditor may not enforce a contract which is to his benefit, or that the very same contract may be enforced when it is not to the creditor's advantage to do so. We find nothing that permits or authorizes discrimination between creditors claiming under the same contract. Either the Joint Resolution prohibits the enforcement of all multiple currency options, whatever

the effect of such enforcement might be, or else it does not hit multiple currency options. It is inconceivable that the same language of the Joint Resolution could be susceptible of two divergent constructions, dependent solely upon what the result or who the obligee might be.

III

ANY CONSTRUCTION OF THE JOINT RESOLUTION SO AS TO REACH THE GUILDER OPTION IN THESE BONDS AND COUPONS WOULD RENDER THE RESOLUTION UNCONSTITUTIONAL.

If the language of the Joint Resolution could be stretched to include within its prohibition the guilder claim of the petitioner, based upon these bonds and coupons, it is quite probable that the Resolution itself, and not the guilder claim would become void and unenforceable. The Resolution as construed and applied by the courts below (a) would not be the regulation of money of the United States previously upheld by this Court but (b) would only be an arbitrary, capricious and unreasonable attempt by Congress retroactively to destroy property and contract rights of substance. For this reason alone, if for no other, the construction and application given the Resolution by the Circuit Court of Appeals is untenable, and its holding that the petitioner's claim for guilders is barred should be reversed. This Court reaffirmed in *National Labor Relations Board v. Jones & Laughlin Steel Corporation*, 301 U. S. 1, 30 that:

"The cardinal principle of statutory construction is to save and not to destroy. We have repeatedly held that as between two possible interpretations of a

statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the act. Even to avoid a serious doubt the rule is the same."

Cf. Russian Volunteer Fleet v. United States, 282 U. S. 481, 492, and cases cited.

The courts below, as will be seen, violated this "cardinal principle of statutory construction" and ignored their "plain duty" in converting what was formerly a valid regulation by Congress into an act the validity of which is extremely doubtful to say the least.

A. The Resolution is constitutional only in so far as it nullifies the traditional gold clauses in private contracts payable in money of the United States.

This Court has held that the Joint Resolution is constitutional only to the extent that it nullifies traditional gold clauses in private contracts payable in money of the United States. *Norman v. Baltimore & Ohio Railroad Co.*, 294 U. S. 240. Even within this limited field its constitutionality rests upon precarious ground. Four Justices dissented in the *Norman* case, and on the same day eight of the Justices held that the Joint Resolution was unconstitutional in so far as it attempted to repudiate the gold clause in obligations of the United States. *Perry v. U. S.*, 294 U. S. 330. The *Norman* case may be taken, therefore, as marking the extreme limits of the implied power of Congress over contracts between private individuals in the exercise of its delegated power "To coin Money, regulate the Value thereof, and of foreign Coin". Art. I, Sec. 8, Cl. 5 of the Constitution.

In the *Norman* case the validity of the Resolution as a monetary measure was (p. 297) "considered in its legislative setting and in the light of other measures *in pari materia*". Thus considered, it was held that the Resolution was merely one of the necessary steps by which Congress had attempted to withdraw gold, gold coin and gold certificates from circulation, to reduce the gold content of the dollar, (upon the assumption that such reduction fell within the power to "regulate" the value of money) and to compensate holders of gold, gold bullion or gold certificates in "an equivalent amount" of lawful money of the United States. These measures and the relation of the Resolution to them are described so fully in the opinion of the Chief Justice that repetition here is unnecessary.²⁹

²⁹It will be remembered that all these measures, summarized at pages 295-7 of the Chief Justice's opinion in the *Norman* case, were monetary measures relating principally to the subject of gold and gold coin. Thus the declaration of the Bank Holiday by the President on March 6, 1933, was accompanied by restrictions upon the hoarding of gold and the shipment of gold abroad, pursuant to the authority conferred upon the Executive by Section 5(b) of the Act of October 6, 1917, 40 Stat. 411. So, also, the amendment to that Act effected by the Emergency Banking Act of March 9, 1933 (48 Stat. 1) authorized the President to "investigate, regulate or prohibit" transactions "by any person within the United States or any place subject to the jurisdiction thereof" relating to foreign exchange, gold, or coin or currency of the United States. That Act also amended Section 11 of the Federal Reserve Act (39 Stat. 752) by authorizing the Secretary of the Treasury to call in "any or all gold coin, gold bullion or gold certificates" upon payment of "an equivalent amount of any other form of coin or currency . . . of the United States". The new authority was exercised in the Executive orders of March 19, 1933, of April 5, 1933 and of April 20, 1933. Then followed Section 43 of the Agricultural Adjustment Act of May 12, 1933 (48 Stat. 51) and the "Gold Reserve Act of 1934" (48 Stat. 337).

We gather from that opinion that it was only because of the obvious relation of the Joint Resolution nullifying gold clauses, to this other legislation relating to gold and money of the United States based on gold, and only because, as Congress declared, gold clauses constituted a *substantial and actual* interference with the policy of Congress adopted in the exercise of its monetary power, that the nullification of gold clauses by the Resolution was upheld. It was for those reasons that the Court said in the *Norman* case (p. 316):

"We think that it is *clearly* shown that *these* [gold] clauses interfere with the exertion of the power granted to the Congress and certainly it is not established that the Congress arbitrarily or capriciously decided that *such an interference existed*."

No necessity or justification for the nullification of multiple currency clauses may be found in the Joint Resolution, in the contemporaneous legislation surrounding its enactment, in the one Congressional report, in the debates, or in the *Norman* case opinion. There has been no showing, however obscure, that multiple currency clauses actually interfere with the exertion of the monetary power granted to Congress by the Constitution, that any such

authorizing the President to reduce the gold content of the dollar, which the President did by proclamation on January 31, 1934. The apparent object of all these legislative measures and Executive acts, including the Joint Resolution, was to reduce the gold content of the dollar and substitute for gold and gold coin "an equivalent amount" of money of the United States. Payments of foreign currency abroad could have no reasonable relation to this general monetary policy.

interference is or was substantial, or that any such interference has been determined or found to exist by Congress. And, of course, "... it is *primarily for Congress* to consider and decide the fact of the danger and meet it". *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 37. Until Congress has made such a determination, any extension of the Joint Resolution over multiple currency clauses, would not only be unwarranted as a matter of statutory construction, but would also be prohibited by the Tenth and Fifth Amendments to the Constitution.

Gold, as the House Committee on Banking and Currency emphasized in its report with respect to the Joint Resolution (H. R. Rep. No. 169. 73d. Cong., 1st Sess.) "is the medium upon which the entire credit and currency structure rests". For this reason the Court held in the *Norman* case that Congress had the power to control and conserve the resources of gold (p. 313); and that contracts dealing with gold, or money of the United States, or any similar subject matter within the control of Congress have of necessity a "congenital infirmity" to which they must succumb when Congress acts. See *Norman v. Baltimore & Ohio R. Co.*, 294 U. S. 240, 307-8; *Holyoke Water Power Co. v. American Writing Paper Co.*, 300 U. S. 324, 341. The conclusion reached in the *Norman* case rested on the finding made after careful consideration that the contracts in question were contracts for the payment of money (p. 302). The contracts in the case at bar, as has been shown (pp. 19-32, 39-46 above), are not contracts for the payment of United States money. A contract for the payment of guilders, such as the guilder option in these bonds and coupons, is unlike a gold clause in that it obviously does not deal with a subject matter which lies

within the control of Congress and is not, therefore, subject to the "congenital infirmity" to which gold clauses have been compelled to succumb.

Although Article I, Section 8, clause 5 of the Constitution grants to Congress the power "To coin Money, regulate the Value thereof, and of foreign Coin", contracts for the payment of foreign money in the country where that money is current are not within the control of Congress. Congress may regulate the value of foreign coin in relation to the value of the dollar, it may prohibit the use of foreign coin in this country, but it should require no argument or authority to establish that Congress may not "devalue" foreign coin or currency or prohibit its use in that country where it must be accepted as legal tender. Cf. *The Collector v. Richards*, 23 Wall. 246, 259-61. The Joint Resolution is presumptively territorial, and not extra-territorial, for the very reason that it is highly doubtful whether Congress has the power to legislate as to such matters as the obligation of the Debtor here to pay guilders in Holland. As this Court said in *Sandberg v. McDonald*, 248 U. S. 185, 195:

"Legislation is presumptively territorial and confined to the limits over which the lawmaking power has jurisdiction."

See also *American Banana Co. v. United Fruit Co.*, 213 U. S. 347.

For the foregoing reasons, the Joint Resolution is valid only to the extent that it is confined to money of the United States, and to gold clauses requiring payment in gold or money of the United States; and it may not extend to multiple currency clauses, not payable in money of the United States, but requiring payment of foreign currency in the foreign country by whose law it is made legal tender.

B. The Joint Resolution if extended so as to nullify the guilder alternative in these bonds and coupons, would constitute an arbitrary and capricious interference with the property and contract rights of the bondholders, in violation of the Fifth Amendment to the Constitution.

The Eighth Circuit Court of Appeals, we believe, lost sight of the fact that Congress has no general power to nullify contracts or to relieve debtors from the hardships imposed upon them by their own contracts, executed freely, openly and without compulsion. It is natural that the Debtor should prefer to pay dollars rather than the guilders which it contracted to pay in its bonds and coupons, but such a preference on its part is equally immaterial. And it is likewise immaterial that other creditors of the Debtor would also prefer to have the contract claim for 14,033,640 guilders reduced from the stipulated dollar value of \$9,512,001.19 to \$5,636,000 (R. 140, 126). In urging that the petitioner's claim be scaled down by \$3,876,001.19, the Debtor and its creditors are asking the courts to condone and even abet a partial repudiation. We repeat that the Debtor clearly understood that its promise to pay guilders might cost it more than the alternative promise to pay dollars would have cost. It must have known that, although its receipts and income would of necessity be in terms of dollars, its liability on these bonds and coupons would still be payable in guilders, regardless of the cost of guilders, if guilders should be elected. Nevertheless, the argument of the respondents in the courts below was that the guilder promise would impose an unwarranted hardship upon the Debtor because its income was in terms of dollars and must for that reason fall within the spirit and intendment of the

Resolution. And this argument, as we have already seen, was accepted by the Circuit Court of Appeals and largely made the basis of its decision (R. 253; 98 F. [2d], at 165-6).

The Joint Resolution was, in short, construed below so as to relieve the Debtor of the obligation of its contracts merely because that obligation proves to be burdensome. The Resolution was not construed and applied as a regulation of money of the United States, but as a repudiation statute, pure and simple, relieving debtors of those obligations which they are unwilling to pay. Such direct nullification of contracts and consequent taking of property for the sole purpose of relieving debtors from the burden of their obligations is clearly prohibited by the Fifth Amendment to the Constitution, and cannot be countenanced in any statute, whether it purports to be a monetary or, even, a bankruptcy law. So much was pointed out in *Louisville Joint Stock Land Bank v. Radford*, 295 U. S. 555, 602, where it was said:

"If the public interest requires, and permits, the taking of property of individual mortgagees in order to relieve the necessities of individual mortgagors, resort must be had to proceedings by eminent domain; so that, through taxation, the burden of the relief afforded in the public interest may be borne by the public."

Consequences, however serious, may not excuse an invasion of constitutional right; *Norman v. Baltimore & Ohio R. Co.*, 294 U. S. 240, 316.

Furthermore, as we have seen, the only construction of the language of the Resolution that would permit the inclusion of the guilden alternative in these bonds and coupons is to find in the Resolution a requirement that any instru-

ment containing a dollar promise together with other promises must be discharged *in its entirety* upon performance of the dollar promise "dollar for dollar". This would necessarily relieve the obligor of every other liability or promise contained in the same instrument. Yet it was the construction given the Resolution by both courts below in holding that the bonds and coupons in suit are obligations "payable" in money of the United States and, therefore, "shall be discharged upon payment" of legal tender dollars for every dollar promised in the gold coin alternative. The destruction of all the granted alternatives in these instruments, other than the dollar alternative, is thereby accomplished wantonly and without any given or discoverable reason or justification. One is asked to assume that Congress took a dislike to alternative contracts wherever one of the alternatives happens to provide for the payment of dollars, and for that reason alone, abolished all but the dollar alternative. For, it will be remembered, under this construction of the Resolution, the presence *vel non* of a gold clause in the instrument is of no moment; as long as one alternative contains a dollar-sign, that alternative "shall be discharged" by legislative fiat, and all other promises in the instrument are thereby voided. A bond with a paper dollar and not a gold dollar clause is just as much an "obligation payable in money of the United States" as is an instrument with a gold clause. The dollar-sign and not the gold clause is controlling.

According to this construction, moreover, the nature of the promises, other than the promise for the payment of gold, that are thus destroyed would be of no consequence. A written promise to pay "a hundred dollars or 240 guilders" is to be treated no differently from a written

promise to pay "a hundred dollars or a horse". In both cases, since the instruments are "obligations payable in money of the United States" according to the decisions below, Congress is said to command that the entire instrument shall be discharged upon the payment of \$100. This rule would seem to apply, irrespective whether the option is in the obligor or in the obligee. If, for example, the promisor of the last mentioned contract had the option and desired to deliver the horse promised, it would seem that he could be compelled to pay the hundred dollars in legal tender dollars.

According to the decisions below, all bonds with penalties for non-performance are within the Joint Resolution, as are all written contracts with provision for liquidated damages. All such bonds and contracts must be discharged by payment of the penalty or liquidated damages, as the case may be; and in no event, we are told, may the obligor acquit himself by performing his contract. Even if the obligor had performed in part or in whole the performance contemplated by the contract, it would seem that the obligee would still have a statutory action under the Resolution for the recovery of the full dollar amount specified in the penalty or liquidated damages clause. Thus, for example, where a fire insurance company exercises its option of rebuilding the burned premises, the insured can wait until the rebuilding has been substantially completed and then sue for the full dollar amount alternatively promised in the policy.

We do not attempt to portray exhaustively the ramifications of the holding below or the extent of the repudiation and wanton destruction of contractual rights that would be wrought by the Resolution as conceived by the Eighth

Circuit Court of Appeals. Mere suggestion of the possibilities opened up by that unsound decision is enough to show the entire absence of constitutional warrant in legislation so to be construed, and hence the error of the construction reached below of legislative language conceded by the Circuit Court to be at most ambiguous (R. 249; 98 F. [2d] at 163).

CONCLUSION

THE DECREE OF THE CIRCUIT COURT OF APPEALS AFFIRMING THE ORDER OF THE DISTRICT COURT SHOULD BE REVERSED, AND THE CAUSE REMANDED TO THE DISTRICT COURT FOR FURTHER PROCEEDINGS IN CONFORMITY WITH SUCH DECISION.

Respectfully submitted,

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January 14, 1939.

APPENDIX A

[Opinion handed down by the Court of Appeals of New York on January 11, 1939, reversing the decision in 164 Misc. 498, affirmed without opinion in 254 App. Div. 839]

Court of Appeals

ZURICH GENERAL ACCIDENT & LIABILITY
INSURANCE COMPANY, LTD.,
Appellant,

v.

BETHLEHEM STEEL COMPANY,
Respondent.

No. 430-A

OPINION

O'BRIEN, J.:

March 1, 1910, Lackawanna Steel Company, predecessor of defendant Bethlehem Steel Company, issued a series of gold bonds payable March 1, 1950, in United States Gold in the sum of \$1000. and also in Pound Sterling at £205.15.2 Guilders at 2480, Marks at 4200. and Francs. If paid in Francs in France, Belgium or *Switzerland*, the corporation promised to pay 5,180 Francs and interest in the respective currencies. Each coupon contained a promise that, if paid in France, Belgium or *Switzerland*, the corporation would pay 129.50 Francs for each six months interest, and that they were payable not only at New York, but at London, Frankfort, Amsterdam, at *Basel* and *Zurich* at *Schweizerische Kreditanstalt*.

Plaintiff, a Swiss corporation having its principal place of business in Switzerland, purchased 323 of these bonds. On July 16, 1936, it presented 1132 coupons at *Schweizerische Kreditanstalt* at *Zurich* and demanded payment at the rate of 129.50 Swiss Francs or an aggregate of 146,594 Swiss Francs and on September 7, 1936, it presented at the same place 323 coupons for payment at the same rate or an

aggregate of 41,828.50 Swiss Francs. On both occasions payment in these amounts of Swiss Francs was refused. The allegations in the complaint are that on July 15, 1936, the market value of 146,594 Swiss Francs in Zurich was \$48,009.54 in lawful money of the United States, and that on September 7, 1936, the value of 41,828.50 Francs was \$13,631.90. The relief demanded in the complaint is judgment for \$61,766.04 with interest. Judgment has been rendered in favor of plaintiff only for the sum of \$36,375. and its complaint was dismissed in respect to its claim of right to receive 129.50 Swiss Francs for each coupon. Such judgment resulted upon the theory that plaintiff is not entitled to receive more than the value in United States currency of present legal tender reduced by reason of the Joint Resolution of Congress June 5, 1933.

The question is whether, on the facts of this case, the Joint Resolution is applicable to this obligation to pay foreign currency to a foreign corporation in a foreign country. The courts below have held that it is. We are convinced of the correctness of the contrary result flowing from the decision of the Circuit Court of Appeals, Second Circuit, in *Anglo-Continentale Treuhand, A. G. vs. St. Louis Southwestern Ry. Co.* (81 Fed. 2d, 11—1936) wherein the facts were the same at bar except that payment was made in Guilders at Amsterdam instead of Francs at Zurich. That court decided that damages recoverable in dollars were required to be calculated at gold par of the Guilder and not at the rate of exchange prevailing in New York at the time of the judgment.

On the facts of this case, the obligation was not payable in "money of the United States" but in foreign currency and therefore the Joint Resolution is not applicable. The obligation might have become payable at New York in United States money, but the fact is that it did become payable in Switzerland in Swiss currency.

The judgment of the Appellate Division and that of the Trial Term should be reversed and plaintiff's motion for summary judgment granted with costs in all courts.

Court of Appeals

ZURICH GENERAL ACCIDENT & LIABILITY
INSURANCE COMPANY, LTD.,

Appellant,

vs.

BETHLEHEM STEEL COMPANY,

Respondent.

No. 430-A

MEMORANDUM

FINCH, J. (Dissenting):

To restrict the phrase "obligation payable in money of the United States" so as to exclude a bond, if in addition, for convenience of foreign bondholders, it also provides for payment in what was meant to be an equivalent amount in Swiss francs, guilders or other foreign currency, would seem to be unduly narrowing a resolution which by its language indicated that it was of the broadest scope. A reading of the joint resolution shows it to be a resolution not only broad in scope, but one referring to an obligation as a whole rather than to any particular provisions contained therein (*Norman v. B. & O.*, 294 U. S. 240; *Perry v. U. S.*, 303 U. S. 330).

Furthermore, a detailed analysis of the language used would seem to show that the ordinary meaning of the language would reach and apply to every obligation issued before or after the 4th of June, 1933, capable of being paid in the United States. Every such obligation shall be discharged upon payment dollar for dollar in any coin or currency which at the time of payment is legal tender for public and private debts. While the first sentence of the resolu-

tion considers the obligation as a whole, and strikes down the gold clause, the next sentence provides in the most sweeping language for every obligation which is capable of being paid or may be paid in money of the United States. This language of the joint resolution does not exclude a bond payable in money of the United States because such a bond also contains a provision as a matter of convenience for the payment of the same amounts in foreign currencies. An obligation which is payable in money of the United States is no whit less such an obligation because it also gives the obligee the right to receive the equivalent of this money in foreign currency.

The obligations in suit are certainly capable of being paid in money of the United States, which bring them within the terms of the Joint Resolution. As such they are dischargeable, dollar for dollar in legal tender.

When we consider that the Joint Resolution precludes a Court of the United States from enforcing a gold clause provision, we are forced to the conclusion that such Courts may not enforce similar provisions of coupons having the same effect.

The intent of Congress being manifest, to strike down gold clause provisions and any other obstructions to its currency policy, it would seem to follow that all similar provisions contained in the principal obligation should be likewise invalid, to the end that a uniform parity should exist as to all obligations which are capable of being paid in dollars.

The judgment appealed from should be affirmed, with costs.

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FEB 8 1939

CHARLES FLEWELL CHURCH

IN THE

Supreme Court of the United States

OCTOBER TERM, 1938

No. 384

GUARANTY TRUST COMPANY OF NEW YORK,
as Trustee under St. Louis Southwestern Railway Com-
pany First Terminal and Unifying Mortgage dated Jan-
uary 1, 1912,

Petitioner,

against

BERRYMAN HENWOOD, Trustee of St. Louis South-
western Railway Company, Debtor, ST. LOUIS
SOUTHWESTERN RAILWAY COMPANY, and
SOUTHERN PACIFIC COMPANY,

Respondents.

PETITIONER'S REPLY BRIEF

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1938

GUARANTY TRUST COMPANY OF NEW YORK,
as Trustee under St. Louis Southwestern
Railway Company First Terminal and Uni-
fying Mortgage dated January 1, 1912,

Petitioner,

against

No. 384

BERRYMAN HENWOOD, Trustee of St. Louis
Southwestern Railway Company, Debtor,
ST. LOUIS SOUTHWESTERN RAILWAY COM-
PANY, and SOUTHERN PACIFIC COMPANY,

Respondents.

PETITIONER'S REPLY BRIEF

The respondents' briefs endeavor to support the de-
cision below both by the Joint Resolution of June 5, 1933,
which was the basis of the decision, and by resort to three
other arguments which were not considered or relied upon
by the Courts below.¹

**A. As to the Effect of the Unexercised Gold
Clause Option in the Bonds.**

**1. The Result Arrived at upon Respondents' Construc-
tion of the Joint Resolution Stretches and Distorts It to the
Point of Absurdity.**

The respondents' construction of the Joint Resolution
has the following consequences.

¹Brief of respondent Henwood, pages 66, 96-136.

(a) It seeks to obtain the discharge of all multiple currency obligations containing a dollar clause upon the payment or tender of United States legal tender currency in disregard of the obligee's expressed right to discard the dollar alternative and elect a foreign currency alternative and *in abrogation* of such right of election. The theory is that extreme and literal compliance is to be exacted with every word of the second sentence of clause (a) of the Resolution, to the extent of the fullest meaning of every word, without restriction or limitation of any sort whether derived from the context, from the preamble, or from the legislative purpose as expressed in the debates and committee reports of Congress.²

(b) The effect of this construction would be to destroy perfectly innocent commodity alternative contracts, as illustrated at pages 96-7 of our main brief. The promisor's undertaking to deliver "a hundred dollars or a horse" at the promisee's election would fall within the inclusive sweep of respondents' argument, despite the absence of a gold clause and despite the difficulty of conceiving a horse as money. For the second sentence is read by respondents to command the discharge of the entire "obligation" upon payment of the dollar alternative, and the "obligation" is said to be the entire instrument with all its complex of duties, and it was "payable" in a particular kind of coin or currency of the United States in the sense that there was the *legal possibility* of discharge in such currency. Thus the unfortunate promisee is obliged to take the hun-

²Which, so far as appears, were concerned only with the supply of *monetary gold* in this country and with its relation to *United States currency*.

dred dollars and cannot get the horse because giving him the horse would impose an unreasonable obstruction upon the power of Congress to regulate the currency!

Obviously the argument proves too much. It is unnecessarily destructive of established property rights in no way involved with the regulation of the currency. The respondents recognize this. They say that contracts with a primary commodity alternative would not fall within the Joint Resolution.⁸ But the alternative contract supposed is not primarily a commodity contract. It is equally a money contract. Petitioner in Nos. 590 and 591 argues that the most casual reading of the second sentence shows it to deal only with "payment",⁴ apparently contending (although the argument is not developed) that the promisee's election of the horse in the case supposed would not be a taking of payment, *i. e.*, that the contract after the election would not be a money contract. But obviously before election of the horse the contract would be "payable" in dollars, in the contingent sense urged by petitioner in Nos. 590 and 591 and by respondents here. If so "payable", it would upon the construction urged be stripped of the option clause and of all alternatives but the dollar clause. Furthermore it is clear that the commodity alternative in a money contract does not deprive it of its character as such, since notes may be made payable in specific articles and the delivery of such an article pursuant to the note is payment. *Roberts v. Beatty*, 2 Penrose & Watts 63, 21 Am. Dec. 410 (Pennsylvania 1830); *Bailey v. Simonds*, 6 N. H. 159, 25 Am. Dec. 454 (1833); *Wyman v. Winslow*,

⁸Henwood brief, page 94; Southern Pacific brief, page 24.

⁴Brief of petitioner Bethlehem Steel Co., page 28, note 11.

11 Me. 398, 26 Am. Dec. 542 (1834); *Dunman v. Strother*, 1 Tex. 89, 46 Am. Dec. 97 (1846); *Paynie v. Couch*, 1 G. Greene 64, 46 Am. Dec. 497 (Iowa 1847); *Cole v. Ross*, 9 B. Monroe 393, 50 Am. Dec. 517 (Kentucky 1856).

(c) Respondents' construction destroys the right of election reserved to the promisee in an option contract. In most cases, as with the bonds here involved, this is a valuable right, carefully worked out and deliberately reserved. Ordinarily it would be such as a court of law might be expected strictly to enforce. *Paradine v. Jane*, Aleyn 26 (1648). This Court is asked to find as a matter of law that Congress intended to abrogate a valuable right of this character by language which nowhere mentions options or alternative contracts, adopted to meet an emergency with which such instruments had no connection, as a result of deliberations in which they were not named or considered. See *Ozawa v. United States*, 260 U. S. 178, 194. While the construction of the Joint Resolution urged by respondents is defended in the present instance as necessary to reach a foreign currency alternative contracted for as the equivalent of a dollar gold clause in 1912, yet that construction is necessarily so broad and sweeping as to strike down many contract rights having no relation and no equivalence to gold values.

(d) Respondents' contentions involve the further absurd result that in some readily conceivable situations they would deprive the debtor of a contractual option to discharge his debt in a depreciated currency. Suppose a contract to pay a designated sum at the option of the obligor either in dollars in the United States or in a number of francs corresponding to the dollar amount at the exchange

equivalent of 1912. If the debt matured in 1936, the obligor would desire to discharge it in depreciated francs. It would be to his advantage to do so, and the right to do so was one which formed an essential consideration in the original bargain. Nevertheless upon respondents' extreme construction the entire instrument must be discharged by payment in dollars, and the debtor, whom it is asserted Congress desired to benefit, is actually penalized. There was no evidence before Congress at the time of the adoption of the Joint Resolution, as to the exact amount or nature of multiple currency contracts that might be claimed to be affected by its language. Is it to be conceived that Congress "advisedly employed" the "sweeping language"⁵ of the Resolution so as to strike down all kinds of contract rights, not definitely envisaged, which might well have included rights of the kind supposed above? Is it not rather to be conceived that Congress by the language of the second sentence of clause (a) intended merely to regulate the payment of matured and enforceable obligations coming to be paid in American money, and confine the scope of its currency regulation to American currency and its metallic base?

(e) Respondents' construction further presupposes a discrimination silently made by Congress between two indistinguishable groups of American debtors required to make payments abroad in foreign currency. See at pages 25-27 below.

These unreasonable results Congress is supposed to have accomplished silently, without mention thereof in any debate or committee report, under cover of United States

⁵Brief of petitioner in Nos. 590 and 591, page 38.

currency regulation, and without employment of any words specially adapted to the end desired. The unreasonableness of the results flowing from respondents' construction is in itself cogent indication that that construction is wrong. What is the reasoning upon which respondents have arrived at these astonishing results?

2. Respondents' Construction of the Joint Resolution Is Untenable.

Respondents here and petitioner in Nos. 590 and 591 rely for their conclusions upon a few central contentions. These are:

(a) The contention that the dollar alternative is primary in the obligations of respondent St. Louis Southwestern Railway Company.

This argument appears to be the foundation of the brief of Southern Pacific Company herein (p. 8). It is argued by the respondent Henwood (brief, pp. 26, 74, 76), who concedes that the Circuit Court of Appeals so construed the bonds (p. 74), but is unwilling to concede that the decision turns upon such a finding (p. 75). This contention is sought to be supported upon two grounds.

First, it is argued that the original issue of the bonds was had in an American economic setting and the parties thought only in terms of dollars. Manifestly such an appeal to extrinsic circumstances could have no effect upon the interpretation of a contract precise and clear in its terms.

⁹*United States v. Ryan*, 284 U. S. 167, 175; *Fleischmann Co. v. United States*, 270 U. S. 349, 360; *Hawaii v. Mankichi*, 190 U. S. 197, 212; *Lau Ow Bew v. United States*, 144 U. S. 47, 59; *United States v. Kirby*, 7 Wall. 482, 486.

If the parties unmistakably contracted for the giving of consideration by the one upon the receipt from the other of a promise to make specified payments in alternative currencies at the promisee's election, it can make no difference to the enforcement of such a contract that the original contracting parties were both Americans. The foreign currency alternatives were factors essential to the creation of an international market for the bonds and helpful in making such a market. The issue of bonds here involved was \$8,155,000 (R. 133) of a contemplated issue of \$100,000,000 (R. 18).⁷ For such a proposed issue it was desirable to add to the market the leading financial capitals, and it is a misconception to assume that the original transaction had no international aspects (Southern Pacific brief, p. 11). The promise to make payments abroad at the option of bondholders certainly gave the transaction an international aspect. Where the Court can see that at the time of making an option contract it was thought possible that at the time fixed for performance one alternative might prove more desirable than another, the contract will be enforced according to its terms. 3 Williston on Contracts (Rev. Ed. 1936), page 2194, § 178.⁸

⁷A further \$13,583,000 aggregate principal amount of bonds authenticated since 1912 by the petitioner, were later issued (R. 135) and are involved in the appeal of Chemical Bank & Trust Company, No. 495, heard herewith.

⁸Among the authorities cited are *Taylor v. Smith*, 25 N. Y. App. Div. 632 (see 24 App. Div. 519, 528), and *Missouri-Edison Electric Co. v. Steinberg Co.*, 94 Mo. App. 543, 68 S. W. 383. *The indenture here in suit was executed by the Debtor and the petitioner in New York (R. 100-3) and by the individual trustee in Missouri (R. 103), and the bonds were authenticated by the petitioner in New York (R. 131).

Second, it is argued that the bonds construed with the mortgage were *primarily* payable in dollars. This matter is discussed at pages 19-24 of our main brief. While respondents rely upon provisions of the mortgage asserted to show that the foreign money alternatives are secondary,⁹ these provisions at most raise a conflict with the unequivocal language of the bonds themselves. The bonds, as we have shown, connect the foreign currency alternatives with the disjunctive *or* and provide for payment at the holder's option at any of the five designated places. The equal and co-ordinate character of the alternatives could not be clearer. The fact that the Debtor is an American national, that holders may be American nationals, that the trustees are American nationals, does not make the debt one payable in dollars until the option for dollars has been exercised by or on behalf of the holder. The provisions of the mortgage relied upon by respondents describe the foreign currency amounts with the words "also to be payable" and the foreign places of payment as places "in addition to the City of New York" (R. 18, 19). But these are merely recitals in the mortgage generally describing the bonds, and do not purport to amend their terms or state them with legal precision. Elsewhere the mortgage affirmatively provides that the Debtor shall pay the bonds "at the dates and the places and in the manner mentioned in such bonds . . . according to the true intent and meaning thereof" (R. 59). Inconsistency, if there were such, in the recitals relied upon by respondents could not survive that express adoption of the terms of the bonds as the true measure of the obligation. Another clause relied upon by respondents is Article First.

⁹R. 18, 19, 38, 39, quoted in Southern Pacific Co. brief, pages 8-9, and in Henwood brief, page 76.

Section 4 of the mortgage (R. 38-9). The language there employed, placing the "option" after the dollar alternative and before the foreign currency alternatives, is obviously accidental and without legal significance as against the bonds themselves. The description in the same section of the *face amount* of the bonds as United States gold coin or the equivalent in foreign currencies "calculated at the rates of exchange stated in the form of coupon bond hereinbefore [i.e., R. 19-21] set forth" means merely that the dollar alternative is taken as the measure for calculation of the foreign currency amounts. The necessity of some such measure to avert an over-issue has already been explained (main brief, pp. 24-5). The selection of dollars as that measure has no more significance than the selection of guilders, marks or sterling would have had; for the number of units of each currency was calculated so as to be equal to the other at the exchange rates of 1912.

(b) The contention that the second sentence of clause (a) is of primary and controlling significance in the interpretation of the Resolution.¹⁰

The respondent Henwood rests his argument principally upon this sentence (brief, pp. 20-38); and the petitioner in Nos. 590 and 591 constructs its case upon this sentence, which it characterizes as "the principal enacting

¹⁰This sentence is: "Every obligation [payable in money of the United States], heretofore or hereafter incurred, whether or not any such provision [which purports to give the obligee a right to require payment in gold or a particular kind of coin or currency, or in an amount in money of the United States measured thereby] is contained therein or made with respect thereto, shall be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts."

sentence of the Resolution" (brief, p. 31).¹¹ Respondents press for an unlimited application of certain words therein, viz., *obligation* and *payable in money of the United States* and *shall be discharged*. It is by their own labors of exegesis upon these words that counsel on the other side of the question have satisfied themselves regarding "the all-inclusive character of the statute's application" (Henwood brief, p. 41) and the "purpose" of Congress "to limit the measure of recovery upon such obligations" (Bethlehem Steel Co. brief, p. 35).

But in fact, in seeking to find the purpose of the legislation by deduction from their own construction of certain enacting language, divorced from the context and from the preamble and from the evidence in the Congressional Debates, counsel have flown in the face of accepted canons of statutory construction. Every part of a statute (such as the second sentence of clause [a]) must be construed in the light of the whole (here including the first sentence and the preamble).¹² The strict letter of the Resolution, if it could be construed to destroy foreign currency alternatives, should yield to its evident spirit and purpose of regulating merely United States currency and its relation to monetary

¹¹The careful and closely reasoned opinion of Circuit Judge Learned Hand is attacked (Henwood brief, p. 53; Bethlehem brief, p. 31) for failure to discuss specifically this second sentence. *Anglo-Continentale Treuhand A. G. v. St. Louis Southwestern Railway Company*, 81 F. (2d) 11, certiorari denied 298 U. S. 655.

¹²*Helvering v. New York Trust Co.*, 292 U. S. 455, 464; *Ginsberg & Sons v. Popkin*, 285 U. S. 204, 208; *Cherokee Intermarriage Cases*, 203 U. S. 76, 89; *Brown v. Duchesne*, 19 How. 183, 194; *Pennington v. Coxe*, 2 Cranch 33, 128.

d.¹³ In case of ambiguity in the enacting clause, doubts may be resolved by reference to the title and the preamble.¹⁴ These rules have decisive significance upon the true meaning of the second sentence of clause (a). The title of the Resolution is "To assure uniform value to the coins and currencies of the United States". The preamble deals exclusively with the holding of or dealing in gold and obligations exacting gold or money of the United States measured by gold, and declares *these, and no others*, to obstruct the power of Congress to regulate the value of money in the United States and to be inconsistent with the Congressional policy to maintain parity among the types of United States currency. The first sentence of clause (a) is specific and limited in its enumeration of provisions declared to be against public policy. They are only such provisions as confer on the obligee rights to require payment

1. in gold,
2. in a particular kind of coin or currency,
3. in an amount in money of the United States measured by gold,
4. in an amount in money of the United States measured by a particular kind of coin or currency of the United States.

the concluding portion of the first sentence, which prohibits their insertion in obligations hereinafter incurred, is

¹³*Fleischmann Co. v. United States*, 270 U. S. 349, 360; *Trinity Church v. United States*, 143 U. S. 457, 459.

¹⁴*Bengzon v. Secretary of Justice*, 299 U. S. 410, 416; *Trinity Church v. United States*, 143 U. S. 457, 462; *S. v. Palmer*, 3 Wheat. 610, 631, per Marshall, C.J.; *Price v. Forrest*, 173 U. S. 410, 427; *Coosaw Mining Co. v. South Carolina*, 144 U. S. 550, 563.

likewise exactly expressed to cover the four types, and only the four types, declared to be against public policy. "No *such* provision" is the scope of this prohibition.

What then is the function of the second sentence immediately following this enumeration of the provisions declared to be against public policy and hereafter prohibited? Is its function to broaden the impact of the Resolution immeasurably out of relationship to its title, its preamble, its purpose, and its constitutional basis in the power of Congress? Obviously, we submit, the answer must be in the negative. It is the first sentence, the preamble, and the title that fix the scope and aim of the legislation. The function of the second sentence is to execute that aim, to implement the policy declared by providing the means of discharge of the prohibited clauses *and of those only*. Were it not for the second sentence, the contention might have been made that any instrument containing a gold clause had been annulled as violative of public policy.¹⁵ The second sentence excludes such a contention by directing that nevertheless a gold clause obligation shall be discharged by payment dollar for dollar in legal tender. The further function of this direction is, as an exercise of the currency power of Congress, to insure the equality of Federal Reserve notes and other currency as units of account with

¹⁵Such was actually the holding of Rosenman, J., in the *Zurich* case, No. 590. Here he declared that, if one alternative method of payment is proscribed by the statute expressly, the entire obligation is covered, and that *both alternatives* contained therein become unenforceable. 164 Misc. 498, 500-1, affirmed 254 A. D. 839, reversed in Court of Appeals on January 11, 1939. This line of argument is no longer pressed by counsel for the petitioner in No. 590, but the respondent Henwood seems still to adopt it in relying on cases such as *Johnson v. Joyce*, 90 Minn. 377 (brief, pp. 69-70).

former gold dollar. Such effect was given to it by the
 ment of this Court in the *Norman* case, 294 U. S.
 t 314.

carry the second sentence further and strive to
 e it as an instrument of discharge entirely beyond
 ope and purpose of the Resolution as set by all its
 elements is, we submit, a plain distortion of the legis-
 intent. The argument of the petitioner in Nos. 590
 91 (brief, pp. 18-19) carries such distortion to the
 ne. Concentrating upon the second sentence, which
 contains 47 words, that petitioner's counsel restate it
 lusion of the definitions elsewhere found in the Reso-
 obtaining a form which comprises 96 words.* They
 y skilful excision reduce it to 20 words. These turn
 be:

Every obligation payable in money of the United
 States shall be discharged upon payment, dollar for
 dollar, in legal tender.

conclude that theirs is the only construction "which
 effect to every word in the Joint Resolution". If that
 we suggest, they have indeed achieved a concentra-
 meaning and an economy of language never hither-
 mined, for they have expressed in 20 words the full
 ng upon which Congress wasted hundreds of words,
 ave reduced to superfluity the preamble, the first
 ce of clause (a), and all the rest of the enactment.

this kind of dialectic it is sufficient to oppose the
 ing of Marshall, C.J., referred to by this Court in
 s v. *United States*, 287 U. S. 435, 446:

"In *United States v. Palmer*, 3 Wheat. 610, 631,
 Chief Justice Marshall, in construing the Act of

Congress of April 30, 1790, § 8 (1 Stat. 113) relating to robbery on the high seas, found that the words 'any person or persons' were 'broad enough to comprehend every human being,' but he concluded that 'general words must not only be limited to cases within the jurisdiction of the state, but also to those objects to which the legislature intended to apply them.' "

(c) The contention that the second sentence is to be construed by systematic enlargement of the operative words to the limit of their meaning.

Thus the argument is that "obligation [payable in money of the United States]" as employed in the second sentence imports the entire instrument embodying the contract, on the ground that a distinction is made in the first sentence between "provision" and "obligation". It is indeed true that the scope of the two words is different. The scope of "provision" must be less than that of "obligation", in order that the former may be contained in the latter. Even if to be taken as the instrument, not the duty incurred, an "obligation" contains various formal clauses, such as recitals, the description of the parties, the *teste*, not properly falling within the meaning of "provision" as defined in the first sentence. *But that is the maximum significance of any distinction between the two in the first sentence.* The fact that the inclusion of "provision" is less than that of "obligation" does not mean that the latter word was conceived by Congress to include much more than it normally includes, *e. g.*, a five-part currency clause of a rare type.¹⁶

¹⁶Unless of course the gold dollar alternative should mature by exercise of an option so as to become the *sole* method of discharge.

The employment of "every" with the word when it recurs in the second sentence does not take it outside the *eiusdem generis* rule; it does not extend its scope, so far as concerns the payment clause, beyond the four types enumerated in the first sentence; it does not make the word mean "all kinds of obligations".

Yet the Court will observe that respondents' contention to the contrary and insistence upon a meaning for "obligation" in the second sentence far broader than anything suggested in the first sentence, is the very essence of their argument. This is so despite the fact that it is conceded in the present case that "obligation" is a word of several legal meanings, that it is often used in a sense embracing more than one of these meanings, and that it is *probably used in two senses* in the Joint Resolution.¹⁷ Moreover both senses (*i. e., debt or instrument*) might be deemed to refer to a single obligation to pay in United States dollars, like that involved in the *Norman* case, or an alternative contract where each alternative is a United States money clause, like that in the *Holyoke* case.

Next, respondents employ for the purposes of this case the most extended meaning of the word "payable". In the direction given by the second sentence for the discharge of every obligation "payable in money of the United States" by payment in legal tender, they insist that the word "payable" means capable or susceptible of payment upon any future contingency, so as to cover multiple currency bonds containing the dollar alternative even though the dollar alternative be not elected and some foreign currency alter-

¹⁷Henwood brief, pages 22, 23.

native be elected. The result so attained is one of those injustices to which would seem applicable the injunction of Brett, M.R., that "a judge ought to struggle with all the intellect that he has, and with all the vigor of mind that he has, against such an interpretation of an act of Parliament."¹⁸ For it is sought thereby to derogate from the strict terms of a contract freely entered into, to deprive one party of a stable value for which he had previously given value, and to do so by means of legislation concededly not based on any "affirmative consideration" by Congress¹⁹ of this special type of contract or without any serious contention that the regulation of United States currency requires it to be stricken down.

Correctly read in the light of the other provisions of the Resolution, the second sentence is instinct with the conception of maturity and payment. The word "payable" imported therein from clause (b) can, as a matter of fair and reasonable construction, have reference only to the state of the contract at the moment of discharge and payment. The verb in the sentence is "shall be discharged", the moment in the life of the contract contemplated by Congress for the operation of the second sentence is "at the time of payment". Admittedly the word "payable" has several definitions. In this context, it can refer only to sums absolutely due and owing after the performance of conditions preced-

¹⁸In *Plumstead Board of Works v. Spackman*, L. R. 1 Q. B. D. 878, 887, quoted with approval in *Hawaii v. Mankichi*, 190 U. S. 197, 214, and *Sarrells v. U. S.*, 287 U. S. 434, 448.

¹⁹Bethlehem Steel Co. brief, page 37; Henwood brief, page 85.

dent, such as options. For this use of the word "payable" in the sense of strictly to be paid rather than permissively to be paid, the precedents are clear. In addition to the cases cited in our main brief, reference may be made to *Cole v. Ross*, 9 B. Monroe 393, 50 Am. Dec. 517 (Kentucky 1856), and *Johnson v. Dooley*, 65 Ark. 71, 44 S. W. 1032, 1034.²⁰

The argument is advanced that *Hodges v. Shuler*, 22 N. Y. 114, and like cases cited by us (our main brief, p. 43, note 16), together with *Hotchkiss v. National Banks*, 21 Wall. 354, sustain respondents' position that the Debtor's bonds were payable in United States money within the meaning of the Resolution before election of any alternative on behalf of the holders, for the reason that these cases hold a note with alternative promises to pay money or deliver a commodity, to be payable in money so as to be negotiable even before maturity. Ingenious as it is, this argument turns upon the precise nature of the contracts involved in those cases. Reference to the opinion in the *Hodges* case, as well as to *Hotchkiss v. National Banks*, 21 Wall. 354; 358, will show at a glance the reason for the conclusion reached. That was that the note was so expressed that the money was absolutely due *unless* the holder should choose the alternative. The note was thus a defeasible promise to pay money, and was a money contract until

²⁰The point made by respondent Henwood that none of the authorities defining "payable" in commercial usage involved alternative contracts, does not seem material. The question is what the word means in connection with dollar obligations, and, even if the respondents are right in construing the Resolution as applicable to alternative contracts, they will concede that it is not *limited* to such contracts.

defeasance by a contrary election.²¹ As the instruments here involved contain equal and co-ordinate alternatives, none of which is owing until elected, the negotiable note cases are not analogous.

The third expression in the second sentence of clause (a) upon which respondents lay extreme and undue stress is "whether or not". In the Resolution as written, the meaning of this phrase is scarcely doubtful. The first sentence of clause (a) had declared to be against public policy certain types of provision. The second sentence provided that every obligation heretofore or hereafter incurred *whether or not* any such provision is contained therein or made with respect thereto, shall be discharged upon payment dollar for dollar in legal tender. The force of "whether or not" in this construction is plain. In a sentence providing that obligations payable in money of the United States shall be discharged upon payment in legal tender dollars, it adds the direction that this shall be so *even if* a gold clause shall appear in the obligation. This Court in effect so stated in *Holyoke Water Power Co. v. American Writing Paper Co.*, 300 U. S. 324, 339, in paraphrasing the second sentence:

"... every obligation, heretofore or hereafter incurred, *though* it contain such provisions, shall be payable, dollar for dollar, in legal tender at the time of payment." (Italics supplied.)

²¹See 22 N. Y. 114 at 115, 118. The effect of these cases is incorrectly stated at page 43 of our main brief. The second complete sentence from the foot of that page should read: "The reason for this rule is that, unless the holder elects the commodity alternative, the instrument remains one for the payment of money and nothing else."

Counsel on the other side of the question disregard this construction and the plain meaning of the phrase. They extend the phrase in the most extraordinary and unwarranted way. They say it means

"whether or not such 'obligation' contains . . . any other 'provision' for an alternative mode of payment at the option of the obligor or obligee";

"regardless of whether such obligation is *also* payable in a medium other than money of the United States";

"the second sentence . . . prevented the enforcement in accordance with their terms . . . of all 'provisions' calculated to have like effect [with gold clauses];"²²

"irrespective of the other provisions contained therein";

"irrespective of the provisions for payment in Dutch guilders or other foreign moneys".²³

The extent and the gratuitousness of these enlargements upon the legislative meaning require no comment.

The fourth expression in the second sentence of clause (a) upon which respondents rely is "shall be discharged". They properly take these words to be mandatory, commanding or directing discharge of the obligation upon payment in legal tender dollars.²⁴ The result of the application of this mandatory language to a subject-matter which respondents have broadened far beyond the actual intent of

²²Bethlehem Steel Co. brief, pages 19, 20, 46.

²³Henwood brief, pages 13, 21, 84.

²⁴See Henwood brief, page 7—"must be discharged"; Southern Pacific Co. brief, page 26—"command"; Bethlehem Steel Co. brief, page 27—"it is the mandate".

Congress is, as we have shown, absurd and unjust. It means the discharge of contracts containing ordinary dollar and commodity alternatives upon payment of the dollars even though the commodity is elected; compulsion upon the debtor to pay dollars, even though he has an option to deliver a chattel of less value or to pay in depreciated foreign money; and the like. Faced with this possibility, the petitioner in Nos. 590 and 591 seeks to retreat. It asserts that the language construed to be mandatory really grants the obligor a "right" or "authority",²⁵ and does not force him to pay the dollar amount if he does not so desire. Presumably this argument is based upon the words "upon payment, dollar for dollar" immediately following the words "shall be discharged" in the second sentence, and the implied contention (although not overtly expressed) is that those words signify "if payment shall be made in dollars, then dollar for dollar", etc.

Any such argument gives away the entire case. It amounts to a contention that Congress deliberately discriminated in favor of debtors and against creditors by taking away the right of election, in option contracts, as regards creditors while preserving it in favor of debtors. Such a construction of the Resolution, if frankly avowed by counsel, would meet at once with the condemnation of the due process clause of the Constitution, as exemplified in *Louisville Joint Stock Land Bank v. Radford*, 295 U. S. 555. It would be an open abandonment of the constitutional basis in the money power of Congress which has heretofore been held to sustain the Resolution in its impact on the gold clauses.

²⁵Brief of Bethlehem Steel Co., page 28, note 11.

A construction of legislation which turns upon forcing to the limit of their denotation each of the four expressions above discussed, demonstrates its own unsoundness.

(d) The contention that the first sentence²⁶ of clause (a) of Section 1 shows alternative contracts to have been within the contemplation of Congress.

It is pointed out that literally the content of the "provision" at which the first sentence is directed is in the disjunctive. It is argued that, since the "obligation" containing such provision is defined by clause (b) to be one "payable in money of the United States", the draftsman contemplated an alternative contract in which one option should be United States gold dollars and the other might be gold bullion.²⁷ The conclusion reached is that a Congress which contemplated such an alternative contract might well have contemplated a multiple currency alternative contract.

The answer to this contention is very simple. So far as concerns the case supposed of an alternative contract embracing both gold bullion and United States dollars, the gold alternative would according to the facts of the particular case be determined to be either a money clause or a commodity clause. If a money clause, it would be clearly within the Resolution, and the first sentence of clause (a)

²⁶This provides that "every provision contained in or made with respect to any obligation [payable in money of the United States] which purports to give the obligee a right to require payment in gold or a particular kind of coin or currency, or in an amount in money of the United States measured thereby, is declared to be against public policy; and no such provision shall be contained in or made with respect to any obligation [payable in money of the United States] hereafter incurred."

²⁷Henwood brief, pages 83, 84; Southern Pacific Co brief, page 23.

thereof as regards such a contract would deal with alternatives all of which were expressed in United States money. So understood, the first sentence could have no bearing on multiple currency contracts such as are involved in this and companion cases. If construed in the particular case to be a true commodity contract, the gold bullion clause supposed might not be within the Joint Resolution²⁸. Even if not struck down by that legislation, however, it would be made impossible of performance by other legislation, as pointed out in the opinion in the *Holyoke* case, 300 U. S. at 336-7. See also the Government's contention as summarized by the Court in the *Norman* case, 294 U. S. at 298-9. Impossibility of the gold bullion alternative would leave standing the other alternative or alternatives (our main brief, pp. 37-9).

The instrument involved on this appeal is a five-part alternative contract, of which only one branch involves United States money in any form. The other four branches are expressed in foreign currencies. Such a contract is hit by the Resolution in the first branch only. It is beyond dispute that the foreign currency branches, while relating to money *in the place of payment*, can be deemed from the point of view of our law and legislation to relate to a commodity only, for foreign moneys are merely a commodity in this forum.²⁹ The purpose of Congress in prescribing

²⁸See dicta in the *Holyoke* case, 300 U. S. at 339; *Legal Tender Cases*, 12 Wall. 457, 566; *Emery Bird Thayer Dry Goods Co. v. Williams*, 98 F. (2d) 166, now awaiting decision following reargument on December 12, 1938.

²⁹Authorities cited at pages 30-1 of our main brief. We may repeat that this distinction in our law between foreign moneys and United States money, underlies all the judicial opinions exempting multiple currency contracts from the

a mode of discharge of obligations payable in United States money, by the second sentence of clause (a), could not under any fair and reasonable construction have extended beyond the United States money clauses to which the first sentence is plainly confined. The clearest error of the Circuit Court in this case is its holding that the foreign currency alternatives also are money and not commodity contracts. 98 F. (2d) at 166.

(e) The contention that, if construed to regulate the mode of alternative performance in foreign countries by cutting off the right to such performance, the Joint Resolution would still not represent an attempt by Congress to give extra-territorial force to American law.³⁰

Part of our adversaries' argument on this point is addressed to the jurisdiction of the courts. We concede that this Court has jurisdiction to construe the terms of a contract between the parties before the Court, who are American nationals, even with respect to clauses dealing with performance in foreign countries. We concede that Congress would have jurisdiction and power to determine a public policy applicable to United States money contracts,

scope of the Joint Resolution. Learned Hand, Cir. J., in *Anglo-Continental Treuhand A. G. v. St. Louis Southwestern Railway Co.*, 81 F. (2d) 11; cert. den. 298 U. S. 655, followed in *Zurich General Accident & Liability Ins. Co. Ltd. v. Bethlehem Steel Co.*, New York Court of Appeals, January 11, 1939, our main brief, page 99; Lindley, J., in *McAdoo v. Southern Pacific Co.*, 10 F. Supp. 953, 955, reversed on other grounds 82 F. (2d) 121; Martin, J., in *City Bank Farmers Trust Co. v. Bethlehem Steel Co.*, 244 N. Y. App. Div. 634, 644.

³⁰Henwood brief, page 38; Bethlehem Steel Co. brief, pages 29-31.

if found by it necessary to the proper regulation of United States currency, and that such public policy must be applied by our courts regardless of foreign law.


These are the points of the respondents, and they do not touch upon the real objection to their construction of the Resolution from the point of view of the extra-territorial assertion of power. That objection is that the public policy declared by Congress in the premises can be found, upon a fair construction, to relate only to obligations actually coming to be paid in United States currency; that an American public policy concerned with the regulation of United States currency can have no proper concern with foreign currencies payable in foreign countries; and that the attempt to extend the Resolution to reach modes of discharge in foreign currencies leaves the resulting legislative act *pro tanto* outside the Constitutional basis for the exercise of the power of Congress and outside its territorial jurisdiction. Why, indeed, should Congress care about the manner of discharge of a guilder contract? No American public policy can be affected thereby. Cf. *Guaranty Trust Co. v. United States*, 304 U. S. 126, 134, 135. The principle is so plain in the case of a straight guilder contract that respondents make no effort to extend the Joint Resolution to such contracts. With the effect upon American nationals indebted in guilders of the enhanced dollar cost of performance in guilders resulting from the considered Congressional policy of depreciating the dollar, Congress admittedly had no concern. Why should it be affected by the plight of American debtors so indebted in the alternative merely because another alternative of their obligation might be United States gold dollars? Clearly the limit of the interest of Congress in obligations of that character could have been only to provide, as clause (a)

does provide, that neither gold nor an enhanced measure of *dollars* representing gold, shall be exacted of the debtor. Exaction from the debtor of the *original* measure of guilders could not have concerned Congress, even though damages might, in the event of default, be calculated at the enhanced rate of exchange which Congress intended should arise. The Joint Resolution does not envisage defaults. It cannot be construed to fix a measure for damages for breach of foreign exchange contracts. So far as Congress could be imagined to have considered the matter at all, it can only have regarded obligations in terms of foreign currency as remaining constant by the law of the place of payment regardless of its value on foreign markets. *Deutsche Bank v. Humphrey*, 272 U. S. 517, 519. Concededly Congress did not concern itself with straight guilder or other commodity contracts.

The Joint Resolution as respects foreign currency alternatives must be read in the light of the fully established rule that the law of the place of performance, and no other law, determines the measure of performance at that place. *Zimmermann v. Sutherland*, 274 U. S. 253; *Adelaide Electric Supply Co. Ltd. v. Prudential Assurance Co. Ltd.*, [1934] A. C. 122, 151; *Mount Albert Borough Council v. Australasian Temperance etc. Society*, 54 T. L. R. 5; *Rex v. International Trustee*, [1937] A. C. 500, 555.

(f) The contention that, despite the avowed purpose of Congress to depreciate the dollar and its consequent realization that the foreign currency obligations of all American nationals so indebted would be proportionately increased in terms of the dollar, Congress nevertheless singled out for protection against such increase the narrow class of debtors represented by respondents here and petitioner in

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Nos. 590 and 591, while ignoring the precisely similar plight of all other American nationals indebted in foreign currencies, particularly importers of raw materials.

Counsel on the other side of the question are perfectly clear that an essential purpose of the Joint Resolution was to permit partial repudiation by Americans obligated upon foreign currency contracts containing a United States money clause.³¹ This conclusion is rested upon an argument against "discrimination" between Americans indebted in foreign currencies and Americans indebted in dollars. No effort is made to justify the discrimination which, if respondents are right, would be worked between Americans indebted in foreign currencies with an alternative United States money clause and Americans similarly indebted without such a clause. Where, as in the instant case, the United States money clause entirely failed of effect because not elected, no difference of substance whatever exists between the two classes. Manifest is the unsoundness of the argument leading to such an anomalous result. No answer has been found by counsel on the other side of the case to the reasoning of Judge Hand on the point:

"When we went off the gold standard, we added that burden to many other undertakings than those to pay foreign money; that was the result whenever an American obligor could not procure his performance in the United States. If he must buy it with dollars abroad, he was handicapped precisely as the defendant is here. Certainly the resolution cannot by the utmost latitude be stretched so far as to relieve such obligors, and while it is impossible to

³¹Henwood brief, pages 19-20, 35-6; Bethlehem Steel Co. brief, pages 44-5.

know how many citizens were so affected, we should have no warrant for supposing that they were insignificant in number or importance. Equally we should have no warrant in supposing that when the obligation was to pay foreign money, it was any nearer to the putative purposes of Congress than if it was to do anything else."³²

The same considerations furnish the answer to the complaint of Southern Pacific Company (brief, pp. 16-19) that our construction of the Joint Resolution effects an unconstitutional discrimination against creditors, like Southern Pacific Company, holding straight gold clause bonds. That respondent speaks of "the parity" between such bonds and the multiple currency bonds here involved. Why there should be a parity between them as matter of law is not obvious. The difference of form is of crucial importance so far as concerns the Congressional power to regulate United States money; the gold clause bonds held by the Southern Pacific Company are an absolute and unconditional interference with the regulatory power of Congress, while the alternative instruments represented by this petitioner offered at most a threat of such interference, contingent upon the election of the gold clause, a threat which has disappeared by the discarding of that alternative. Upon the discarding of that alternative the Congressional purpose so far as concerns the regulation of the United States currency was accomplished.

³² *Anglo-Continentale Treuhand A. G. v. St. Louis Southwestern Railway Co.*, 81 F. (2d) 11, 12, cert. den. 298 U. S. 655.

B. As to respondent Henwood's alternative grounds for affirmance.

The respondent Henwood, unwilling to rely wholly upon the single ground of the decisions below, advances three further objections to petitioner's proof of claim in guilders, which, though advanced below, were neither accepted nor rejected by the lower courts. The Circuit Court thought the "outstanding controversy" to be that raised by the Joint Resolution. 98 F. (2d) at 162.

Respondents' objections not having been passed upon below, it is our understanding of the practice of this Court that they will not be decided here in the first instance.³³ The Debtor's trustee requests that they be decided here in the first instance. As the proceeding is one in reorganization, the petitioner as trustee for bondholders concurs in the belief that a single determination of all questions connected with its proof of claim is desirable; and, upon the understanding that the respondents have here presented all such questions as they desire to raise, the petitioner makes no objection to their consideration at this time.

³³*Guaranty Trust Company v. U. S.*, 304 U. S. 126, 144; *Schriber Co. v. Cleveland Trust Co.*, 305 U. S. 47, 61. In the cases relied upon by the respondent Henwood for its claim to review here matters not considered below (brief, pp. 10-11), it appears that the point desired to be reviewed was actually decided below. It is true that the two principal further objections now sought to be raised by the respondent Henwood were raised in the response (pp. 7-8) to the petition for certiorari. We do not question that this Court has power even upon certiorari to base its decision on any ground supported by the record.

1. The petitioner as Mortgage Trustee had power by law and by necessary implication from the indenture to elect the most advantageous currency for bondholders who failed to elect.

The necessity of an election of one of the five currency alternatives in these bonds flows from the nature of these alternatives (elsewhere discussed) as equal and co-ordinate among themselves. Until such an election be had, the amount due will not be fixed, the claim cannot be proved, and the reorganization cannot proceed. So much was clear to the Circuit Court of Appeals, which said on a prior appeal:

"No intelligent action of a final nature can be taken in this proceeding until the claims of creditors under the First Terminal and Unifying Mortgage bonds are fixed in amount. The promise to pay is in several alternatives, and it cannot be known definitely what the amount due on these bonds is until the claims are filed and approved."³⁴

The foreign currency options and the gold dollar option alike are granted by the bond (R. 19) and the mortgage (R. 38) to the "holders" of the coupon bonds. This word is the principal basis of the respondent Henwood's argument on the point (brief, pp. 96-114). Yet it is manifest that a right granted to a bondholder need not be exercised by him *in propria persona* but may be exercised by an agent or trustee like any other right. Inherent in the structure of the mortgage here involved is the power and duty of the Mortgage Trustee to exercise the option under the circum-

³⁴*Guaranty Trust Company v. Henwood*, 86 F. (2d) 347, 53, cert. den. 300 U. S. 661.

stances here presented after giving every facility (as this petitioner did) to individual bondholders to make their own choice.

The facts of the election are clear. Default in interest payment on the bonds occurred January 1, 1936 (R.159). Non-payment continuing for three months constituted an event of default under the mortgage (R. 66-7). The rise of such an event permitted an acceleration of maturity of the bonds. The mortgage conferred the right of acceleration upon the petitioner as trustee (R. 69-70). Upon the completion of the event of default the petitioner therefore began preparations to accelerate the maturity. On April 11, 1936, the Debtor filed its petition in the District Court to enjoin the acceleration, and the injunction was granted on May 5, 1936, but reversed by the Circuit Court of Appeals (R. 135-6). This Court denied certiorari, and the order on remand dissolving the injunction was not made until February 24, 1937. Thereupon, pursuant to the order, the petitioner served notice of acceleration as of May 5, 1936 (R. 136).³⁵

³⁵Since the notice of election was given in Amsterdam on September 24, 1936 (*i. e.*, just a week before proofs of claim had to be filed, so as to give the maximum time to bondholders to make their individual elections if they so desired), the ante-dating of the acceleration made necessary by the injunction proceedings creates the appearance of the election occurring almost five months after maturity. Actually the notice of election as of May 5, 1936, was served on February 25, 1937 (R. 136), and the order on the mandate gave the petitioner the choice of those two dates only (R. 197). Respondents have always sought to take some technical advantage of this artificial sequence of dates, and one of their briefs in this Court contains a statement on the subject which is misleading in the absence of the surrounding facts (Hewood brief, p. 103, note).

In the meantime the petitioner proceeded with the necessary steps for election among the various currency alternatives. Notice of its intention to elect guilders on behalf of bondholders who should not make their own election, and file a proof of claim on a guilder basis was published by petitioner on June 4, 1936.³⁶ The latest date set for the filing of proofs of claim was October 1, 1936 (R. 194-5). After giving the utmost opportunity to individual bondholders consistent with the near approach of this date, the petitioner on September 24, 1936, made its election of guilders on behalf of the bondholders who had not acted for themselves, by formal demand and protest in Amsterdam, and filed a proof of claim on that basis.³⁷

The election thus made was an exercise of power conferred upon the trustee by necessary implication from express provisions of the mortgage, as well as by the Bankruptcy Law and the orders of the District Court.

As has been seen, election among the five currency alternatives was a prerequisite to the ascertainment of any amount due. The mortgage contains the Debtor's covenant to pay to the petitioner as trustee for the benefit of bondholders the whole amount which shall have become due and payable on the bonds and coupons "upon demand of the Trust Company" (R. 76). The Trust Company is empowered to recover judgment "in its own name and as trustee of an express trust". This clause contemplates a maturity arising upon an acceleration of the bonds by the Mortgage Trustee's action, as authorized by the mortgage (R. 69-71), as well as the regular maturity of the bonds. The notice

³⁶R. 179. See the statement at pages 9-10. of our main

³⁷See the statement at page 10 of our main brief.

of acceleration was delivered by the trustee as of May 5, 1936 (R. 136). The consequent proceedings of the trustee on behalf of bondholders, therefore, constituted an exercise of the express powers referred to, since it was the trustee, not the bondholders, to whom the Debtor had covenanted to make payment in an event of default. It is obvious from what has been said that the right of selection of the appropriate currency alternative in the bonds is an immediate and inevitable inference from the powers so expressly conferred. Those powers would be nugatory without that right.

Connected with these provisions for demand of the principal and interest by the trustee upon acceleration is a group of related provisions in the mortgage conferring upon the trustee rights of action at law and in equity and a power of sale, and making provision for the disposition of purchase money received by the trustee (R. 69-74). While the objection is made (Henwood brief, p. 98) that the portions of the mortgage relied on are restricted to proceedings in equity, a judgment, and sale upon default, it is apparent from reference to the acceleration clause and the Debtor's covenant to pay, already mentioned, that the petitioner's inherent power of election under the mortgage is by no means confined to any particular form of proceeding. On the contrary the express powers conferred are in aid of a purpose to enforce the rights of bondholders by a suit or suits in equity or at law of any kind including "any other appropriate legal or equitable remedy" as the petitioner shall be advised to be most effectual in protecting and enforcing the rights of bondholders (R. 71). As against the objection that bankruptcy forbids the judgment and sale on default mentioned in the mortgage (Henwood

brief, p. 98), we need only note that proceedings under § 77 partake of the principles of equity receivership as well as of bankruptcy. Finletter, *Principles of Corporate Reorganization* (1937), pages 1-3; Bankruptcy Act § 77(b) and (1), 11 U. S. C. A. § 205(b) and (1).

Section 77(c)(7), 11 U. S. C. A. § 205(c)(7), expressly authorizes mortgage trustees to file claims on behalf of bondholders

"in which event it shall be unnecessary for the holders of such bonds or securities to file claims in their own behalf . . ."⁸⁸

In this proceeding the District Court, under authority of the statute, authorized this petitioner as trustee of the bonds here involved to file its claim by October 1, 1936 (R. 195) on behalf of the securities outstanding under the mortgage, and expressly directed that the claim so filed should be "for the account and benefit" of the bondholders and that it should thereupon "be unnecessary for the holders of the securities to file claims in this proceeding in their own behalf" (R. 193-4). So well understood was the representative character of the petitioner that respondent Henwood actually opposed an attempt of a bondholder to intervene in the reorganization, with the statement that the Mortgage Trustee "has the right to represent the interests of all bondholders thereunder" (R. 188).

⁸⁸The only exception is that the mortgage trustee is not constituted by the statute the representative of bondholders for the purpose of accepting or rejecting plans of reorganization. The statement of this exception indicates the wide extent in other respects of the power granted mortgage trustees by the act.

So far as concerns the question of this petitioner's right to elect for bondholders, the meaning of the mortgage and statutory provisions just summarized is in our submission perfectly clear. The Mortgage Trustee could not fulfill its statutory power and duty of filing a claim upon the Debtor's bonds for the bondholders so as to make unnecessary the filing of their individual claims, unless it could exercise for them the indispensable right of election so far as not exercised by them individually; for the election is the inescapable condition precedent to the ascertainment of any amount due, which in turn is the condition precedent to the fixation of the claim and the preparation of a reorganization plan. The respondent Henwood's contention to the contrary is directed to the object of procuring a default of election by the great majority of bondholders, so that he may himself elect a currency less advantageous to them.

Our conclusions are supported by well-established principles and the increasing tendency to unitary representation by the mortgage trustee in bankruptcy proceedings. It is unnecessary to extend this brief by discussion of the authorities.⁸⁹ The cases relied upon by the respondent Hen-

⁸⁹Mortgage trustees are appointed to protect the rights of scattered and uninformed bondholders. *Farmers Loan & Trust Co. v. Central Railroad of Iowa*, 8 Fed. Cas. No. 4663 at p. 1040; *In re International Match Corp.*, 3 F. Supp. 445, 449. Where, as in the present case, the mortgage contains a covenant running directly to the trustee, in addition to the promise in the bonds themselves, there are two distinct obligations evidencing a single debt. *In Re International Match Corporation*, 3 F. Supp. 445; *In Re United Cigar Stores Co.*, 68 F. (2d) 895. The authority of the trustee under the mortgage includes all powers which are necessary or appropriate to the carrying out of its duties. Restatement, Trusts, § 186,

wood, such as *Blumgart v. St. Louis-San Francisco R. Co.*, 94 F. (2d) 712; *Bitker v. Hotel Duluth Co.*, 83 F. (2d) 721, and *In re Allied Owners Corporation*, 74 F. (2d) 201, are wide of the point here involved. In these situations the court sought merely to protect represented bondholders against interference with their choice by the mortgage trustee, and used no language which could bear upon the right of the mortgage trustee to act for the benefit of any unrepresented bondholders, as petitioner seeks to do. In the *Blumgart* case, although the present question did not arise, the court said that bondholders seeking to intervene might file their claims upon their bonds unless the trustee under the mortgage did so for all bondholders, and recognized "the practical consideration of the desirability of a unitary representation of the bonds in a reorganization proceeding". 94 F. (2d) at 717. Other cases relied upon by the respondent Henwood arose under instruments not at

Comment (d); Pomeroy, *Equity Jurisprudence* (4th ed.), Vol. 3, p. 2428; Restatement, Agency, §§ 34, 35; *Le Roy v. Beard*, 8 How. 451, 467; *Ventress v. Smith*, 10 Pet. 161, 169. Instances of such included powers are found in *Lane v. Equitable Trust Co.*, 262 Fed. 918, cert. den. 252 U. S. 578; *Continental Equitable Title & Trust Co. v. National Properties Co.*, 273 Fed. 967, approved in *Fidelity-Philadelphia Trust Co. v. Hale & Kilburn Corp.*, 24 F. Supp. 3, 10, 11. Independently of the provisions of the trust indenture, a trust relationship exists between the mortgage trustee and the bondholders. *New York Trust Co. v. Michigan Traction Co.*, 193 Fed. 175, 180; *Old Colony Trust Co. v. City of Wichita*, 123 Fed. 762, 767, affd. 132 Fed. 641; *Marshall & Isley Bank v. Guaranty Inv. Co.*, 213 V. S. 415; *State v. Comer*, 176 Wash. 257, app. dis. 292 U. S. 610. The trustee may thus take proper measures to protect the bondholders in respect to matters not provided for by the indenture. *Frishmuth v. Farmers Loan & Trust Co.*, 95 Fed. 5, 8, affd. 107 Fed. 169.

all comparable to the mortgage here. *In re Prudence Co. Inc.*, 22 F. Supp. 264, and Gerdes on Corporate Reorganization, §1124, relied upon by that respondent (brief, p. 107), actually adopt a position opposite to that taken by the respondent, for they recognize the mortgage trustee as a creditor in proceedings under §77-b whose claim is subject to reduction to the extent that bondholders file individual claims. Cf. *Anglo-California Nat. Bank of San Francisco v. Klein*, 162 Misc. (N. Y.) 898, 911, 912. This petitioner's proof of claim is likewise subject to reduction (R. 5).

The argument that the election of guilders represents an exercise of individual discretion or business choice which must needs be left to the individual bondholders, and could not properly be exercised by a mortgage trustee on their behalf is a palpable red herring. The proposition undoubtedly the freest from dispute in this and the companion cases is that the election of guilders or of Swiss francs is definitely to the advantage of the bondholders. It alone insures that return of fixed value for which they contracted and to which they are entitled.

2. The exchange value of the guilders due from the Debtor in Amsterdam upon demand on September 24, 1936, should be determined at the rate of exchange at the date of the Debtor's petition which is the same as the rate on September 24, 1936.

The District Court found upon the stipulated facts that the rate of exchange of the guilder alike at the time of filing and approval of the Debtor's petition on May 5, 1936, the date of acceleration (which did not, however, fix the currency of payment), and at the time of Guaranty Trust

company's demand in Amsterdam for guilders, was 0.6778 (R. 140). The exchange value after those dates was somewhat lower, being \$0.5560 at the date of the parties' stipulation (R. 140).

The respondent Henwood contends for a rate of exchange as of some date other than the date of breach or the filing and approval of the petition (brief, pp. 114-36), and refers to this Court's adoption of the judgment-date rule in *Deutsche Bank v. Humphrey*, 272 U. S. 517. We submit that that rule is inapplicable to a proceeding in bankruptcy and particularly inapplicable to the question of damages for breach of a contract executed in New York, where the breach-date rule is applied, and where the parties actually contemplated that the exchange value of the foreign currency alternatives should be paid if the currencies themselves were not paid upon demand abroad.

(a) The *Deutsche Bank* case dealt with the asserted liability of the defendant Deutsche Bank in respect of a mark deposit in Berlin.⁴⁰ In his carefully reasoned opinion for the majority Mr. Justice Holmes rested the determination of the date for conversion of the marks into dollars, upon the exclusively foreign situs of all the elements of the contract. He pointed out (pp. 518-9) that at the date of demand the German bank owed no duty to the plaintiff under our law and was not subject to jurisdiction here. He reasoned that the measure of liability imposed by American courts could be only the measure of liability imposed by German law, which could be ascertained only at the moment of judgment. Four justices dissented from that decision,

⁴⁰This is shown by the report below, 7 F. (2d) 330, 331, where the facts are more fully stated.

pointing out that the great weight of authority supported the breach-date rule and holding that the breach-date rule should be applied even under the peculiar facts of that case. Where the facts indicated an American situs for any element of the obligation, this Court in a unanimous opinion by Mr. Justice Holmes applied the breach-date rule as the proper rule of American law. *Hicks v. Guinness*, 269 U. S. 71.

The instant case is one to which the reasoning of *Deutsche Bank v. Humphrey* does not apply and the reasoning of *Hicks v. Guinness* does apply. All the incidents of the contract, except the place of discharge thereof in Amsterdam pursuant to the petitioner's election, had their situs in this country. Here the debtor is situated, here the contract was executed. The dollar alternative was expressed to be payable in New York (R. 19). In connection with the mortgage the parties, as their contemporary correspondence shows (R. 172-3, 133), expressly contemplated payment in this country of the foreign exchange value of guilders in so far as the guilders should not be supplied by the Debtor itself. The Debtor at no time kept an office or agent for the service of the bonds in Amsterdam (R. 132). The main office of Guaranty Trust Company of New York is the only agency ever designated by the Debtor for payment on its bonds (R. 132). At the time of the petitioner's demand and protest for non-payment in Amsterdam, the bondholders had been enjoined by the District Court from proceedings against the Debtor (R. 183).

Under these circumstances, it seems to us clear that the rationale of the *Deutsche Bank* decision is out of place, and that the breach-date rule for conversion of the foreign currency should govern. That is the rule applied by the

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of New York, with which the Debtor's contract was connected at so many points, as above remarked. *Hoppe v. Anglo-Asiatic Bank*, 235 N. Y. 37; *Sokoloff v. National City Bank*, 250 N. Y. 69, 82; *Parker v. Hoppe*, 257 N. Y. 341; *Kantor v. Aristo Hosiery Co.*, 222 A. D. 502, affirmed 248 N. Y. 630. In the absence of the special circumstances envisaged by the *Deutsche Bank* case, this Court applies the breach-date rule. *Sutherland v. Mayer*, 190 U. S. 272, 295; *Hicks v. Guinness*, 269 U. S. 71, 80. The inconveniences and speculations pointed out as a reason for the adoption of that rule in *Hicks v. Guinness* at page 80 by the minority in *Deutsche Bank v. Humphrey* at page 500 are specially applicable to a proceeding in bankruptcy where the creditors have been deprived of their remedy at law by an injunction bringing the debtor's property under the protection of the Court.⁴¹

The value of the guilder at the date of breach, as we have mentioned, was the same as its value at the date of the filing of the Debtor's petition herein.

(b) In bankruptcy the date of the filing of the petition is the proper date for the conversion into dollars of damages resulting from a liability expressed in foreign moneys. That is the moment of the transition of the bankrupt's assets into the custody of the trustee *in custodia legis*. It has been generally considered by the bankruptcy courts that at that moment there vests in the

In a careful study of the question by Osmond K.unkel, *Foreign Moneys in Domestic Courts*, 35 Col. L. Rev. 360, 385, 389, it is pointed out that on principle and authority the value of foreign exchange at the time the cause of action arose should apply in international transactions, including among other cases where the contract was not to be performed in the country of its execution.

bankrupt's creditors as *cestius que trustent* an equitable estate in his property measured in each case by the ratio of the provable claim at that moment to the entire body of provable claims. *Board of County Commissioners v. Hurley*, 169 Fed. 92, 94, 95.⁴² The governing principle is that of an equitable estate or trust fund created for the benefit of creditors and constituted by the estate of the insolvent at the moment of insolvency. *McDonald v. Williams*, 174 U. S. 397; *Price v. U. S.*, 269 U. S. 492, 502; *Merrill v. National Bank*, 173 U. S. 131, 143, 147. See also *Ticonic Bank v. Sprague*, 303 U. S. 406, 411; *In re Portage Rubber Co.*, 296 Fed. 289, 291, certiorari denied 266 U. S. 604. In bankruptcy the filing of the petition is the crucial act which fixes the line of cleavage with respect to the rights of all parties. *White v. Stump*, 266 U. S. 310, 313.

In the application of these principles, the courts have adopted the date of receivership as fixing the measure of damages with respect to liability of the insolvent on sterling contracts. *Claim of Produce Brokers Co. Ltd.*, 286 Fed. 281, 282; *In re Banco Nacional Ultramarino*, 296 Fed. 882, 886. While it is true, as respondent Henwood points out (brief, p. 133), that these decisions were made before the decision in the *Deutsche Bank* case, they nevertheless rest upon the special conception of the creation of a trust fund for the benefit of creditors and the date of that event as the date for the fixation of claims. *Samuels v. E. F. Drew*, 292 Fed. 734, 736, decided in the receivership in

⁴²The opinion of Judge Sanborn in this case was approved in *Acme Harvester Co. v. Beekman Lumber Co.*, 222 U. S. 300, 308, and *Sexton v. Dreyfus*, 219 U. S. 339, 344. Though cited by us below, this case is not noticed in respondent's briefs.

which the sterling claims were filed. That conception is recognized by Mr. Justice Holmes in his opinion in *Sexton v. Dreyfus*, 219 U. S. 339, 344.

Cases relied upon by the respondent Henwood, such as *In re Marshall's Garage*, 63 F. (2d) 759 (brief, pp. 27-9), discuss the difference between the value of performance at the date of bankruptcy and the value of performance at the time stipulated in the contract, in complicated and distinguishable situations. In the present situation, the Mortgage Trustee has pursuant to the contract fixed the time for performance at May 5, 1936 (p. 30 above), as well as fixing the medium of performance upon September 24, 1936; and it is stipulated that the exchange value of the dollar on both those dates and at the date of filing the petition was the same (R. 140). Since none of the authorities cited by respondent in this particular connection involve foreign exchange contract, further discussion of the interesting principles developed by them would seem unjustified.

(c) The respondent Henwood is unable to suggest a satisfactory date for measuring damages in respect of a bankrupt's foreign exchange liability, other than the date of filing the petition so strongly supported by principle and authority. In the Circuit Court that respondent contended for the date of approval of the respective claims as an alternative. As against that it was pointed out that such a rule would, in the event of a fluctuating exchange, give disproportionate importance to the date of filing and allow- ing claims. The result would be to give creditors of the same class unequal shares in the debtor's estate in accordance, not with equitable principles, but with fluctuations of the exchange rate and variations in the dates of allowance.

Moreover, the expedition essential to reorganization proceedings would be seriously interfered with by the delay incident to the litigation of exchange value questions upon the merits of separate claims. *Cf. Continental Illinois National Bank & Trust Co. v. Chicago, Rock Island and Pacific R. Co.*, 294 U. S. 648, 685.

In this Court, the respondent Henwood in effect abandons the position taken below and in his protest (R. 111). While adhering to that proposed rule for "ordinary bankruptcy proceedings", he now believes that in reorganization proceedings the rate of exchange as of the date of adoption of a reorganization plan "is the only proper rate to apply" (brief, p. 136). The result is to give the bankruptcy courts two rules to work with, one applicable in what is called ordinary bankruptcies and the other applicable in reorganization proceedings. But with the new rule proposed by the respondent Henwood a further and insuperable difficulty exists. Upon claims of the character here involved, their amount cannot be determined until the rate of exchange has been fixed. Yet no plan of reorganization can be adopted until the claims of creditors have been qualified by filing and allowance to vote thereon. This consideration has already been found by the Circuit Court of Appeals fatal to the Debtor's attempt to enjoin the acceleration of these bonds. *Guaranty Trust Company of New York v. Henwood*, 86 F. (2d) 347, 353, 354, certiorari denied 300 U. S. 661. It seems to us likewise fatal to the adoption of the date of approval of a reorganization plan as the date for the ascertainment of claims expressed in foreign exchange.

3. The suggested application of the Missouri Constitution and statutes is without merit.

At page 66 of his brief the respondent Henwood refers to the Constitution of the State of Missouri, Article XII, Section 8, and Revised Statutes of Missouri (1929) § 4546, declaring void any fictitious increase of indebtedness of Missouri corporations. He concedes (brief, p. 67) that under these provisions a Missouri corporation could issue its bond for \$1,000 or could issue its bond for 2,490 guilders, in consideration of the receipt of \$1,000 in either instance. But he suggests that the Constitution and statutes do not prohibit a Missouri corporation from issuing in consideration of \$1,000 its obligation to pay *either* of the currencies upon the bondholder's demand. This suggestion, or it is hardly a contention, rests essentially upon the value of the guilder-option "as it turned out" (brief, p. 68), for it is common ground that at the date of issuance of the bonds all the options were of the same value (R. 39). As a matter of principle it is plain that the validity or invalidity of the bond issue here involved, under the statutes and constitution of Missouri, must be determined at the time of issue. The Missouri courts so hold. *Bondurant v. Raven Coal Co.* (Mo. App. 1929, not officially reported), 5 S. W. (2d) 566, 575, followed by the Eighth Circuit Court of Appeals in *Slupsky v. Westinghouse Electric & Mfg. Co.*, 78 F. (2d) 13, 17. If the multiple currency alternatives in these instruments were valid under the law governing the Debtor's powers at the time of issue, they could not have been put *ultra vires* by supervening economic changes. The purpose of the provisions of law cited by the respondent Henwood was merely to insure that the trans-

action resulting in the issuance of corporate securities be real and not a fictitious one. *Memphis & Little Rock R. Co. v. Dow*, 120 U. S. 287, 298; *Planters Operating Co. v. Commissioner of Internal Revenue*, 55 F. (2d) 583, 584; *Kemmerer v. St. Louis Blast Furnace Co.*, 212 Fed. 666; *Firth Co. v. South Carolina Loan & Trust Co.*, 122 F. 569, 574.

CONCLUSION

The decree of the Circuit Court of Appeals affirming the order of the District Court should be reversed. The respondents having submitted the entire case in the interest of expediting reorganization, this Court should take jurisdiction of the whole controversy and direct the approval of petitioner's claim in the full amount thereof.

Respectfully submitted,

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February 7, 1939.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1938

No. 384.

GUARANTY TRUST COMPANY OF NEW YORK, as
Trustee under St. Louis Southwestern Railway Com-
pany First Terminal and Unifying Mortgage dated
January 1, 1912,

Petitioner,

against

BERRYMAN HENWOOD, Trustee of St. Louis South-
western Railway Company, Debtor, ST. LOUIS
SOUTHWESTERN RAILWAY COMPANY, and
SOUTHERN PACIFIC COMPANY,

Respondents.

**JOINT BRIEF BY RESPONDENTS IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI.**

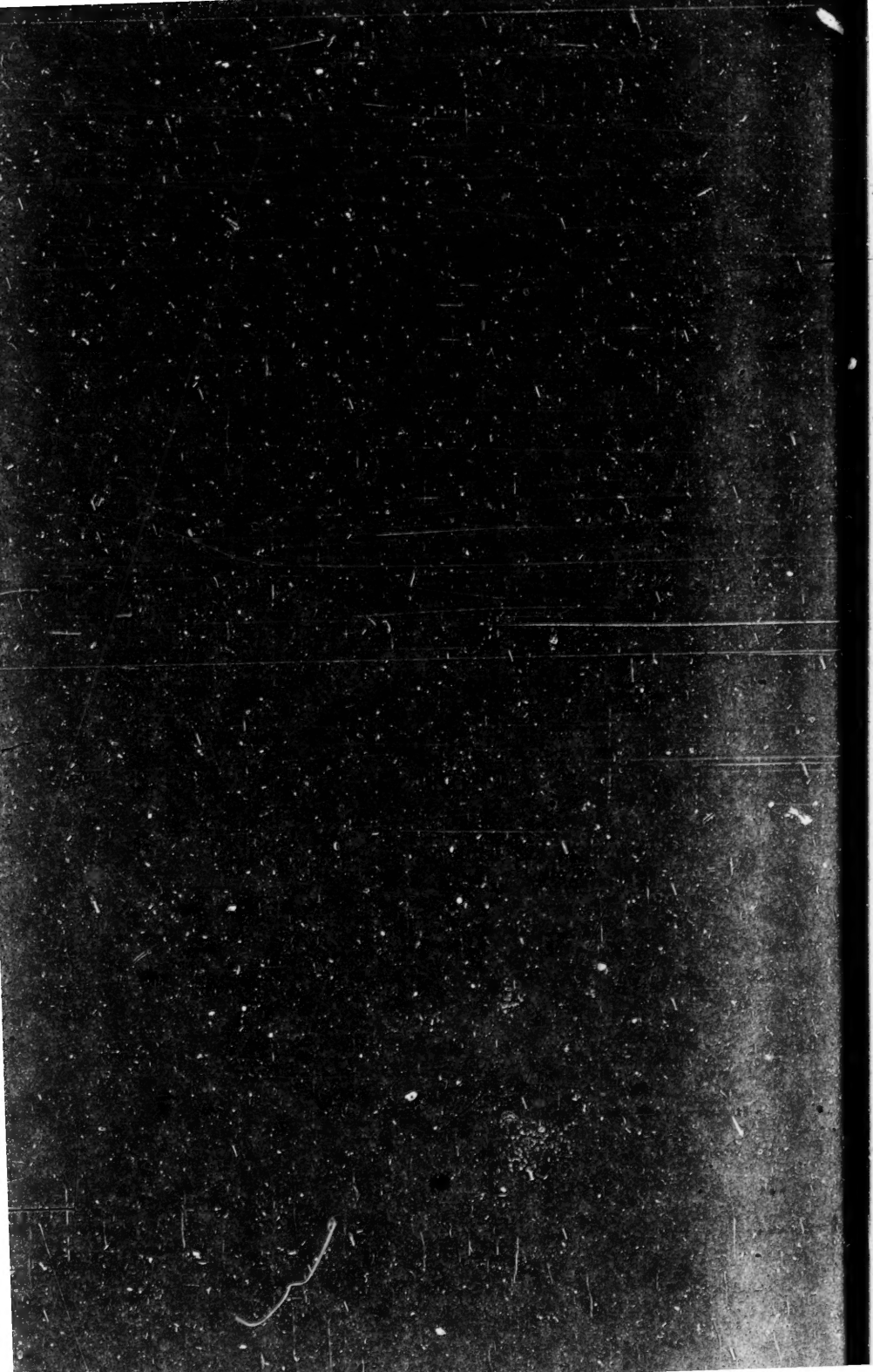
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1938

No. 384.

GUARANTY TRUST COMPANY OF NEW YORK,
as Trustee under St. Louis Southwest-
ern Railway Company First Terminal
and Unifying Mortgage dated January
1, 1912,

Petitioner,

against

BERRYMAN HENWOOD, Trustee of St. Louis
Southwestern Railway Company,
Debtor, ST. LOUIS SOUTHWESTERN RAIL-
WAY COMPANY, and SOUTHERN PACIFIC
COMPANY,

Respondents.

**JOINT BRIEF BY RESPONDENTS IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI.**

Opinions Below.

The United States District Court for the Eastern Dis-
trict of Missouri, Eastern Division, wrote no opinion, but
it made findings of fact and conclusions of law (R. 127-
143). The opinion of the United States Circuit Court of
Appeals for the Eighth Circuit (R. 246-254) is reported
in 98 Fed. (2d) 160, the Advance Sheets for September
12, 1938.

Statement of Case.

The grounds upon which the case was decided below cannot be understood from Petitioner's Summary Statement.

The Respondent, St. Louis Southwestern Railway Company, is a Missouri corporation. As of January 1, 1912, this Company executed its First Terminal and Unifying Mortgage, conveying railroad properties to secure an issue of bonds known as its First Terminal and Unifying Mortgage Bonds. Bonds in the total amount of \$21,638,000 were authenticated by Guaranty Trust Company of New York, as trustee under the mortgage, and are now held by various persons.

Eight million one hundred fifty-five thousand dollars of the bonds (including those involved here) were issued and sold in New York in 1912 to a group of American purchasers, and payment was received in money of the United States (R. 132, 160) in the sum of \$835 for each bond (R. 132). The proceeds were to be used for specified purposes in this country (R. 160-163, 133). The Debtor's First Terminal and Unifying Bonds were issued to evidence the Debtor's liability for the repayment of sums of United States money borrowed; they were not issued upon a sale or purchase of guilders or other foreign money; the provisions contained in said bonds for optional payment in guilders or other foreign moneys were an assurance, in addition to the "gold clause" contained in the bonds, to the holders thereof against a depreciation in the value of the United States dollar; the amount of guilders mentioned in the bonds was at the time of the issuance of said bonds the equivalent of \$1,000 United States gold coin of the standard of weight and fineness as it existed on January 1, 1912, and it was understood, and specified in the indenture under which said bonds were issued, that the amounts of guilders, pounds, francs or marks mentioned in said bonds were each the equivalent of United States

old coin in said amount and of such standard of weight and fineness (R. 134, 160-163, 165-168).

The coupon bonds issued under the First Terminal and Unifying Mortgage contain a foreign money option clause providing that payment will be made in New York in specified amounts of dollars, or at the option of the holders of the bonds and coupons, in London, Amsterdam, Berlin or Paris, in specified amounts of pounds, guilders, marks or francs, respectively. The provisions of the bonds are correctly quoted by Petitioner (Petition, p. 3). These provisions were inserted pursuant to provisions of the indenture reading as follows:

"* * * said bonds, both as to principal and interest, to be payable at the office or agency of the Railway Company in the Borough of Manhattan, in the City and State of New York, in gold coin of the United States of America of or equal to the standard of weight and fineness as it existed January 1, 1912 (the coupon bonds also to be payable, both as to principal and interest, at such places in the following cities in foreign countries as the Board of Directors may from time to time designate, viz.: London, England, or Amsterdam, Holland, or Berlin, Germany, or Paris, France), * * *". (R. 130, 18),

and (Article First, Section 4, thereof):

"All or any of the coupon bonds issued hereunder from time to time shall be payable at the office or agency of the Railway Company in the Borough of Manhattan in the City and State of New York, or, at the option of the holders of said coupon bonds, in the cities and countries, respectively, and in the respective currencies stated in the form of coupon bond hereinbefore set forth, but *the face amount of each of such coupon bonds shall be \$1,000 in United States gold coin of the standard of weight and fineness existing on January 1, 1912, or the equivalent thereof*, calculated at the rates of exchange stated in the form of coupon bond hereinbefore set forth. The principal amount of First Terminal and Unifying Bonds which the Rail-

way Company shall be entitled to issue under the provisions of this indenture shall be ascertained at the like rate or rates of exchange, and, for all purposes of this indenture and of said bonds, the indebtedness represented by said bonds in United States gold coin, as aforesaid, shall be calculated at the like rate or rates of exchange" (R. 130, 38, 39). (Emphasis is ours.)

Because of monetary conditions in the several countries involved, there would have been no substantial advantage to the mortgage trustee or bondholders to claim payment in pounds, marks or francs, but a claim for 2,490 guilders on each \$1,000 bond, if sustained, as of one of the dates mentioned by Petitioner, would result in a premium of about 69 per cent on the face amount of the bonds and coupons, over and above the principal dollar amount thereof (R. 140, 164). The claim on each \$1,000 bond would increase to \$1,687,722, with interest, and the aggregate indebtedness (if the guilder claims should be sustained for the entire issue) would increase from \$21,638,000 to \$37,335,525.12. Upon the bonds represented by the Petitioner concerned in this petition, the indebtedness would be increased from \$5,636,000 to \$9,512,001.19. This situation resulted from a decrease in the gold content of the United States dollar, while the gold content of the guilder remained unchanged.

The guilder is the monetary unit of Holland (R. 137, 165). When the bonds were issued the guilder was worth \$.4020 (R. 140, 168), and \$1,000 would buy 2,490 guilders, the exact number specified in each of the coupon bonds. At the date of the execution of stipulation of facts (November 8, 1937) the exchange value of the guilder was \$.5560 (R. 140, 165). However, the exchange value of the guilder in terms of the dollar was considerably higher on several dates between 1933 and the date of execution of the stipulation. In this connection certain other dates may become important, and the parties have stipulated that on each of the dates in question the exchange value was

6778 (R. 140, 164), viz.: on December 12, 1935, the date on which the Debtor's reorganization petition was filed; on May 5, 1936, the date as of which the Guaranty Trust Company of New York declared all of the bonds immediately due and payable; and on September 24, 1936, the date on which the Guaranty Trust Company of New York executed its proof of claim (R. 140, 164, 165).

The mortgage provides that certain of the bonds are payable at the offices of the Debtor in the several foreign countries named. The Debtor, however, has never maintained an office or agency in Amsterdam, Holland, for the payment of interest or principal on these bonds, or at any of the other foreign cities named (R. 132, 159). As a matter of fact, there was no demand for payment in Holland prior to June 5, 1933, the date of the Joint Resolution of Congress, 48. Stat. 112, 31 U. S. C. A., Section 63 (R. 134, 198). Believing that the Joint Resolution demanded payments in foreign moneys, the Debtor did not provide for the payment of the bonds or coupons in any currency other than that of the United States, and it had no foreign paying agent at any time (R. 132, 180). In this case we are dealing exclusively with the rights of American holders (R. 135).

The Petitioner, as trustee of the First Terminal and Refining Mortgage, sought to exercise election to receive dividends. It states on page 5 of its petition that there was implied power on its part to exercise this election on behalf of bondholders upon whom that power had been conferred and who took no action for themselves. This raises the question of law stated, *infra*, page 7.

The District Court and the Circuit Court of Appeals held that the Petitioner's claim should not be allowed in an amount greater than the face amount of the bonds and appurtenant coupons as expressed in United States money.

Questions presented as viewed by respondents.

Under the heading of Questions Presented, the Petitioner (p. 2, its Petition) undertakes to state the questions concerning the interpretation and application of the Joint Resolution of Congress of June 5, 1933 (48 Stat. 112; U. S. C. A., Title 31, Section 463), which were discussed and decided by the Courts below. In its statement of these questions, the Petitioner has assumed the facts to coincide with its view of the case, ignoring the findings of fact made by the District Court below and concurred in by the Circuit Court of Appeals. These findings dealt with matters which are of importance in reaching the correct determination of the case. Some of the facts so found were that the bond obligations of the St. Louis Southwestern Railway Company represented contracts between American citizens for the loan of United States money and the repayment of the value thereof, a money contract, and not a commodity contract (R. 134, 254); that the provisions in regard to optional payment in foreign moneys were inserted as an additional safeguard against monetary devaluation, supplementing the gold clause (R. 134); and that the amounts of foreign moneys mentioned in the foreign money options were fixed as the equivalent in value of United States gold coin of the standard of weight and fineness as it existed January 1, 1912 (R. 134, 252). The case was presented in the District Court upon a stipulation of evidentiary facts, supplemented by oral testimony. The findings of the Courts below upon the correct inferences to be drawn from the stipulated facts and testimony are not to be ignored. *United States v. Commercial Credit Co.*, 286 U. S. 63, 67. A statement less simple but more accurate than the Petitioner's of the question of law decided by the Court below is the following:

Does the Joint Resolution of Congress of June 5, 1933, directing that every obligation payable in money of the United States, heretofore or hereafter incurred,

shall be discharged upon payment, dollar for dollar, in any coin or currency of the United States which at the time of payment is legal tender for public and private debts, direct the manner of discharge of bonds sold in 1912, payable in 1952, by an American corporation to American purchasers in consideration of American money loaned in a transaction in no way related to the money of any foreign country, where the bond contract when read with the mortgage indenture was to pay \$1,000 in United States gold coin of the standard of weight and fineness as it existed January 1, 1912, or the equivalent thereof in specified amounts of foreign moneys at the holder's option?

Petitioner's question No. 1 relates to an agreement payable solely in guilders in Holland, and we have no difficulty in joining with the Petitioner in answering it "No".

Petitioner's questions Nos. 2 and 3 ignore that the Courts below found the promise to pay United States money to be primary (R. 141, 252), ignore all of the other factors mentioned above, and ignore that the option to receive guilders had not been exercised on June 5, 1933, so that upon the date of the passage of the Joint Resolution the bond represented a contract obligation payable in money of the United States and within the reach of the Joint Resolution.

Additional questions will be presented in this case if this Court should not concur in the conclusion of the Courts below that the Joint Resolution is applicable to the bonds concerned. We shall not enumerate all of the questions which are raised in the protests and supplemental protests of the Respondents (R. 106-123). One of the most serious questions arises from the fact that the Petitioner seeks to support the allowance of its proof of claim for the value of guilders upon a purported election to receive guilders made by it as mortgage trustee, and not by the bondholders. For the Petitioner's claim to be allowed in the amount claimed by it, the following question would have to be answered in the affirmative:

Where by the terms of the bonds, coupons and indenture of mortgage; the option to receive guilders

instead of dollars was specifically reserved to the holders of the bonds and was not conferred upon the mortgage trustee, may the mortgage trustee elect to take guilders in behalf of bondholders who have refrained from making such an election upon their own account and who have not authorized the mortgage trustee to make such an election for them?

From the first the Respondents have contended that this question must be answered in the negative, and that the application of the Joint Resolution of June 5, 1933, is not really and truly involved in this case.

If all of the other questions in this case should be decided in favor of the Petitioner, an important question remains as to the measure of damages. The Respondents have contended throughout that as the place for the payment of guilders is abroad, the claim therefor should be translated into dollars upon the basis of the exchange value of the guilder in terms of the United States dollar upon the judgment date, *i. e.*, the date of the allowance of the claim. *Deutsche Bank v. Humphrey*, 272 U. S. 517; *Zimmermann v. Sutherland*, 274 U. S. 253; *Restatement, Conflict of Laws*, 1934, Section 424. The Petitioner has contended that these decisions are inapplicable to an insolvency proceeding, and has argued that the date of the filing of the petition under amendatory Section 77 of the Bankruptcy Act is determinative. On the other hand, other dates may be of possible significance, *i. e.*, the date of the acceleration of maturity of the bonds, the date of demand for payment in guilders, or, inasmuch as the real issue is as to the securities to be received upon reorganization, perhaps the date of the consummation of the reorganization plan should be controlling. The importance which this subordinate question might assume is apparent from the variations in the dollar value of the guilder stated on pages 4 and 5, *supra*.

We mention these various questions since if certiorari should be granted without limitation, as requested by Petitioner, all of these points will have to be briefed and presented to the Court.

ARGUMENT

L

There is no conflict between the decision below and the previous decision of the United States Circuit Court of Appeals for the Second Circuit in *Anglo-Continentale Treuhand, A. G. v. St. Louis Southwestern Railway Company*, 81 Fed. (2d) 11, certiorari denied, 298 U. S. 55, which has not been resolved by the intervening decision of this Court in *Holyoke Power Co. v. Paper Co.*, 300 U. S. 324, and there is no conflict between the decision below and any other Circuit Court of Appeals' decision.

The conclusions of law of the District Court (R. 143) and the opinion of the Circuit Court of Appeals for the Eighth Circuit (R. 249) expressed disagreement with the conclusion reached by the Circuit Court of Appeals for the Second Circuit in *Anglo-Continentale Treuhand, A. G. v. St. Louis Southwestern Railway Company*, decided January 13, 1936, *supra*, and these Courts were of the opinion that the premises upon which the Second Circuit proceeded were inconsistent with the intervening decision of this Court in *Holyoke Power Co. v. Paper Co.*, decided March 1, 1937, *supra*. We believe that the Courts below were correct in their analysis and that the points of conflict between the Second Circuit Court of Appeals and the Eighth Circuit Court of Appeals have already been determined by this Court consistently with the decision of the Eighth Circuit. If so, there is no occasion for the issuance of a writ of certiorari in respect to a conflict which has already been resolved. We do not claim that the Supreme Court has decided the exact question or questions presented in this case, but we do affirm that the Supreme Court has rejected the interpretation of the Joint solution adopted by the Second Circuit Court of Ap-

peals and has established guides to the interpretation of the Joint Resolution which were correctly applied in the opinion below.

In *Anglo-Continentale Treuhand, A. G. v. St. Louis Southwestern Railway Company*, *supra*, the plaintiff, a corporation of the Principality of Liechtenstein, in Europe, sued upon certain interest coupons maturing January 1st and July 1st, 1934, and January 1st, 1935, appurtenant to the bonds (here involved) of the St. Louis Southwestern Railway Company, containing foreign money options, and sought to recover the value of the Dutch guilders which it had elected to receive. Upon the pleadings and affidavits, summary judgment for the plaintiff was directed in accordance with the New York practice, for the value of the guilders elected, and this was affirmed by the Second Circuit Court of Appeals. It has been suggested that the case rested upon the foreign ownership of the bonds and coupons, but the opinion makes clear that the Court did not regard the nationality of the owner of the bonds or coupons as important. A careful study reveals that the Court based its conclusion that the Joint Resolution did not apply upon two principal premises.¹ The first premise was that the effect of the Joint Resolution was limited to a proscribing of the provisions mentioned in the first sentence of the enacting clause thereof. This is implicit from the following statement of the Court in the second paragraph of the opinion:

¹Unfortunately for the clarity of the opinion, the Court, by some inadvertence, misstated the question for decision in the third sentence from the end of the first paragraph of the opinion. It stated: "The only question is whether the damages recoverable in dollars in this action are to be calculated at the gold par of the guilder, or at the rate of exchange prevailing in New York at the time of judgment." In fact there was only a slight variance between the gold par of exchange in the years 1934 to 1936, i. e., \$680.56 (R. 168), and the exchange value of the guilder then current. Any substantial variation would have been corrected by the shipment of gold. This inadvertence led to the absurd summary of the decision in the syllabus to the effect that the Court held that damages should be recoverable calculated at the gold par of the guilder and not at the prevailing rate of exchange in New York. Of course, it is elementary that the value of foreign moneys is determined at the exchange rate at the date which is deemed important by the Court, and never at its nominal par. 48 C. J. 606; *Sutherland v. Mayer*, 271 U. S. 272, 295.

"still it is a plausible, though to us not a persuasive, argument that 'obligation' means the instrument itself and that the resolution therefore covers all instruments which contain a promise to pay money of the United States. That would put these bonds within the resolution as to the promise to pay dollars in gold, as of course they are, but it does not advance the defendant's case a whit as to the other promises. They are within the resolution only in case its terms cover them, which they do not. It only proscribes a 'provision' which 'purports to give the obligee a right to require payment in gold or a particular kind of coin or currency, or in an amount in money of the United States measured' by either. Since, as we have seen, the promise to pay guilders did not 'purport * * * to require payment in gold,' the resolution does not hit it."

In this language the Court concluded its statement of reasons why the language of the Joint Resolution did not hit the coupons in question. The opinion can be traced and no reference can be found to the second sentence of the enacting clause of the Joint Resolution. The Court failed to perceive that if it had yielded to what termed the plausible but not persuasive argument that "obligation" included the coupon as such, such coupon became dischargeable, dollar for dollar, in United States legal tender by reason of the express command of the second sentence of the Joint Resolution.

The second premise of the opinion was that the application of the Joint Resolution should be determined by consideration solely of the written face of the contract, and that the Court should not consider the circumstances surrounding the making of the contract to determine whether it was in fact a money contract, as, for instance, an agreement from an American debtor to an American creditor to repay American money loaned for use in America, or a commodity or foreign money contract, as, for instance, an agreement given to a foreign creditor to evidence a transaction in or concerning guilders. This premise the Court

emphasized in the next to the last paragraph of its opinion, as follows:

"If the resolution did not reach bonds held by aliens when passed, it did not reach those then held by citizens; we cannot give the same words one meaning for one set of obligees and another for another. Congress either forbade the enforcement of such promises, or it did not. We will not try to recast it altogether, excepting alien obligees though its language covers them equally with citizens."

When this Court came to consider the interpretation of the Joint Resolution as applied to an alternative contract of a somewhat different type, its opinion, rendered through Mr. Justice CARDOZO on March 1, 1937, in *Holyoke Power Co. v. Paper Co.*, *supra*, illuminated the Joint Resolution and gave proper point to its language. It swept away previous misconceptions, including the premises advanced by the Circuit Court of Appeals for the Second Circuit in support of its decision in *Anglo-Continentale Treuhand, A. G. v. St. Louis Southwestern Railway Company*. The *Holyoke Power Co.* case dealt with a lease which provided that the grantee should yield and pay to the grantor as rent "a quantity of gold which shall be equal in amount to fifteen hundred (\$1500) dollars of the gold coin of the United States of the standard of weight and fineness of the year 1894, or the equivalent of this commodity in United States currency." The lessee contended that it could discharge the rental by the payment in United States lawful tender of the number of dollars mentioned. This Court held for the lessee on the ground that the contract was "within the letter of the Joint Resolution of June 5, 1933, and equally within its spirit."

The Supreme Court did not ignore the second sentence of the Joint Resolution, as did the Second Circuit, but to the contrary found that the obligation being considered by it was one to be discharged under the command of the second sentence, dollar for dollar, in legal tender. It said: in *Holyoke Power Co. v. Paper Co.*, *supra*, page 335:

"The obligation was one for the payment of money, and not for the delivery of gold as upon the sale of a commodity."

and again, on page 339:

"Accordingly, all such provisions (those mentioned in the first sentence of the Joint Resolution) are declared to be against public policy, and every obligation, heretofore or hereafter incurred, though it contain such provisions, shall be payable, dollar for dollar, in legal tender at the time of payment."

and on page 340:

"'Dollar for dollar', the obligation for the payment of money conforming to the standard of the covenant is to be discharged with money of the standard established by the law."

After the decision in the *Holyoke* case, we submit that the *Anglo-Continentale Treuhand, A. G. v. St. Louis Southwestern Railway Company* decision by the Circuit Court of Appeals for the Second Circuit is no longer authoritative for the proposition that the Joint Resolution does no more than proscribe the specific provisions enumerated in the first sentence thereof.

It is equally clear that the second premise of the Second Circuit Court of Appeals' decision that the application of the Joint Resolution may not vary with the circumstances surrounding the execution of a contract was expressly repudiated by this Court in the *Holyoke* case, where, in considering the contract there concerned, it observed, on page 335 of its opinion, that the lessor was a water power company engaged in that business and not in any other, and that there was no pretense that it was stipulating for gold to be used in art or industry, but that which it wished was currency, or bullion susceptible of being converted into currency, and said:

"We must consider the situation of the parties, their business needs and expectations, in gauging their intention."

After this emphasis by this Court upon the duty to consider all surrounding circumstances in determining whether a contract is the kind of obligation which comes within the provisions of the Joint Resolution, it would be idle for anyone to refer to the *Anglo-Continentale Treuhand, A. G. v. St. Louis Southwestern Railway Company* case to support the proposition that varying circumstances may never determine whether an obligation is a money contract within the terms of the Joint Resolution or solely a commodity contract outside of its reach.

The Circuit Court of Appeals for the Eighth Circuit in its decision rendered July 13, 1938, perceived the irreconcilability of the views expressed by the Circuit Court of Appeals for the Second Circuit in the *Anglo-Continentale Treuhand* case with the guides given by the Supreme Court in the *Holyoke* case (R. 249).¹ It then proceeded to a determination of whether under the circumstances in the record before it the First Terminal and Unifying Bonds of the St. Louis Southwestern Railway Company were obligations payable in money of the United States, money contracts, dischargeable, dollar for dollar, in United States legal tender, or commodity contracts outside of the reach of the Joint Resolution. In determining this question it conducted an inquiry which had not been conducted by the Second Circuit Court of Appeals because that Circuit Court of Appeals had thought, upon grounds now untenable, that an inquiry of such a nature was pointless.

¹It said: "Both the *Anglo-Continentale Treuhand* and the *McAdoo* opinions reveal the same reasoning in reaching a decision. That reasoning is that the language of the resolution is clear and unambiguous and means obligations which *must* be paid in United States gold dollars or the equivalent thereof in other United States money." That is indeed the effect of those decisions which find in the Joint Resolution only a proscription of any individual promise requiring payment of gold or a particular kind of coin or currency or an amount in money of the United States measured thereby. Thus, to come within the reach of the Joint Resolution as so limited, there must be a promise which combines an agreement to pay in gold and an agreement to pay in United States money, which is, we take it, the peculiar feature of the conventional agreement to pay in United States gold coin. With the disappearance of United States gold coin from circulation it is not likely that the gold coin contract will again become popular. The Joint Resolution, if so interpreted, would have a very limited application in the future.

If our analyses of the decisions are correct, there is no conflict remaining to be resolved between the Circuit Court Appeals for the Second Circuit and the Circuit Court Appeals for the Eighth Circuit calling for the granting certiorari. When we have the considered views of this court upon the interpretation of the Joint Resolution, it seems fruitless to us to speculate upon why this Court denied certiorari in *Anglo-Continental Treuhand, A. G. St. Louis Southwestern Railway Company*.

Some reference is made in the petition, page 9 thereof, to alleged conflict between the decision below and the decision in *McAdoo v. Southern Pacific Company* (Dist. Ct., D., Cal., S. D.), 10 Fed. Supp. 953. That decision, rendered June 17, 1935, was reversed on jurisdictional grounds by the Circuit Court of Appeals for the Ninth Circuit in 10 Fed. (2d) 121, and the suit was later dismissed by the district court. There is, therefore, no conflict between the decision below and the Ninth Circuit Court of Appeals.

The opinion of the Eighth Circuit Court of Appeals in *Emery Bird Thayer Dry Goods Co. v. Williams*, 98 Fed. (2d) 166, rendered July 13, 1938, on the same day the decision below was handed down, was not regarded by the majority joining in the majority opinion therein as conflicting. A petition for rehearing has been granted, the decision has been set aside, and the case set for reargument on October 31, 1938 (see footnote 1, p. 10, Petitioner's brief). Since there has been no final decision in the *Emery Bird Thayer* case by the Eighth Circuit Court of Appeals, it cannot be said that there is any existing conflict within the Circuit. To charge the existence of a conflict with the *Emery Bird Thayer* case, when the Circuit Court of Appeals has not finished its consideration thereof is premature. Even if the Eighth Circuit Court of Appeals should reaffirm the conclusions expressed in its opinion in that case, in our judgment there is no necessary conflict between that case and the decision in

the case at bar. Unquestionably, in the *Emery Bird Thayer* case the option to receive United States money was secondary to a primary promise to deliver gold as a commodity, whereas in the instant case the promise to pay United States gold coin was either primary, as found by the Courts below, or of equal rank with the other promises in the bonds, as contended for by Petitioner. If the Circuit Court of Appeals should reaffirm its conclusions in the *Emery Bird Thayer* case, there may well be a probable conflict between that decision and the decision of this Court in *Holyoke Power Co. v. Paper Co.*, but this would constitute a ground for granting certiorari in that case and not a reason for granting certiorari in this case.

II.

It is true that the Circuit Court of Appeals for the Eighth Circuit has decided a question concerning the application of a Federal statute, but we cannot agree that the question is of great public importance, outside of the substantial amounts involved in the case at hand, and certainly the decision is not in probable conflict with the applicable decisions of this Court.

This Court has dealt with the constitutionality and interpretation of the Joint Resolution in the three gold clause cases, *Norman v. Baltimore & Ohio R. Co.*, 294 U. S. 240; *Nortz v. United States*, 294 U. S. 317; *Perry v. United States*, 294 U. S. 330, in *Holyoke Power Co. v. Paper Co.*, 300 U. S. 324, and in *Smyth v. United States*, 302 U. S. 329. The opinions reflect the full consideration given these cases and we suggest that the discussion of the Joint Resolution contained in these opinions is sufficient to afford suitable guides for the interpretation and application of the Joint Resolution by the lower Federal Courts. Certainly the Courts below in this case were directed in their solution of the problem by the decisions of this Court.

The importance of the precise question at issue, viz., the application of the Joint Resolution to United States money contracts containing foreign money options, has become of somewhat lesser importance in the last few years. A number of bond issues having such options have been redeemed recently, and there are only two uncalled issues, in addition to the St. Louis Southwestern Railway Company issue, which are payable in money of the United States, or conditionally in a foreign money now at a premium, viz., an issue of Southern Pacific Company and an issue assumed by Niagara, Lockport and Ontario Power Co. Also some bonds of this character of the Bethlehem Steel Company, which have been called for payment, are still outstanding. Moreover, the foreign moneys in which these issues are conditionally payable, Dutch guilders and Swiss francs, now command a smaller premium than they did several years ago.

That the Petitioner itself does not believe that the question presented in this case is of importance because of the prevalence of litigation involving the same issue is indicated by the language used by the Petitioner in its brief in opposition to Trustee Henwood's petition for a writ of certiorari in the case of *Guaranty Trust Company of New York v. Henwood*, 86 Fed. (2d) 347, certiorari denied, 300 U. S. 661, a case between the Petitioner and Respondent Henwood involving the acceleration of maturity of these same bonds, where the Petitioner (respondent there) said on page 17 of its brief:

"In his (Henwood's) petition to this Court, dated March 2, 1936, in *Anglo-Continental Treuhand, A. G. v. St. Louis Southwestern Railway Company, supra*, requesting a writ of certiorari with respect to these same multiple-currency bonds, this petitioner stated that approximately \$90,000,000 face amount of bonds issued by American obligors

have alternative provisions for payment in moneys of countries remaining on the pre-war gold standard. Bonds falling in the last-mentioned category

have been issued by such representative companies as Bethlehem Steel Company, Lackawanna Steel Company, Southern Pacific Company, Pacific Gas & Electric Company, as well as St. Louis Southwestern Railway Company' (p. 6).

Of the companies enumerated by the petitioner (Hewood) as having issued bonds containing a provision similar to the instant one, St. Louis Southwestern Railway Company, the Debtor here, is the only railroad corporation—so that, by the petitioner's (Hewood's) own showing, no other proceedings under Section 77 would ever be likely to present the question involved here. The decision in this case affects only the interests of the parties to this cause."

Moreover, on page 29 of Petitioner's brief in this case it minimizes the importance of the rule applicable to contracts containing multiple-currency clauses.

If the decision had been to the contrary in the Court below, it is true that a very substantial burden would have been placed upon the debtor companies still having such issues outstanding. There has been little interest, however, among the holders of these bonds to secure payment at more than the dollar face of the bonds or coupons. On pages 11 and 12 of the Petitioner's petition it has undertaken to list the cases which have dealt with the application of the Joint Resolution to such bond contracts. With one exception, every reported case is concerned with a suit brought by a trust company, acting because of the compulsion of its fiduciary position, or by a European corporation which had recently acquired bonds or coupons, presumably for the purpose of speculation. The one exception is the case of *McAdoo v. Southern Pacific Company, supra*, and there the individual bondholder owned one bond of the face value of \$1,000! Bonds of this kind are held by insurance companies, savings banks, and other responsible institutions, but by and large these holders perceived and acted upon the considerations which prompted the observation of the New York Appellate Division, First

partment, *City Bank Farmers Trust Co. v. Bethlehem Steel Co.*, 244 App. Div. 634, 280 N. Y. Supp. 494, 497, that:

"Equity and justice demand that all who live under and enjoy the benefits of our government and its laws should be placed upon an equal footing, at least in so far as our currency is concerned. Mindful of its underlying purposes, good citizenship requires that the resolution should be accepted in a spirit which will not permit an unfair advantage to the creditor at the expense of the debtor."

We are not beside the mark when we say that practically sole interest in securing a review of the decision be- is on the part of fiduciaries wishing to be sure that y have discharged the duties of their trusts, and inter- national speculators seeking an opportunity to make a fit.

Petitioner is wrong when it says in its petition, page that the decisions in New York State on this question in hopeless confusion. To the contrary, every unre- sessed decision in New York holds that the Joint Resolu- applies to bonds payable in money of the United tes or optionally in foreign moneys. These decisions, interpreting and applying the Joint Resolution, are:

City Bank Farmers Trust Co. v. Bethlehem Steel Co., 244 App. Div. 634, 280 N. Y. Supp. 494 (Appellate Division, First Department);

Anglo-Continentale Treuhand, A. G. v. Southern Pacific Company, 251 App. Div. 803, 298 N. Y. Supp. 181 (Appellate Division, First Department), affirming 165 Misc. 562, 299 N. Y. Supp. 859;

Zurich General Accident & Liability Ins. Co., Lim. v. Bethlehem Steel Co., 254 App. Div. 839, 6 N. Y. Supp. (2d) 139 (Appellate Division, First Department), affirming s. c. *sub. nom. Zurich General Accident & Liability Ins. Co., Lim. v. Lackawanna Steel Co.*, 16 Misc. 498, 299 N. Y. Supp. 862 (Appeals are pending in the New York

Court of Appeals in this case and in the one next cited);

Anglo-Continentale Treuhand, A. G., et al. v. Bethlehem Steel Co., 254 App. Div. 844, 6 N. Y. Supp. (2d) 334, (Appellate Division, First Department) modifying decision below (98 N. Y. L. J. 1164, October 15, 1937);

Hydropréss Handels, A. G., et al. v. Lackawanna Steel Co., 99 N. Y. L. J. 106, page 2221, May 7, 1938 (New York Supreme Court).

As indicated, all of these decisions sustained the application of the Joint Resolution to a bond of this character. After the leading decision in *City Bank Farmers Trust Co. v. Bethlehem Steel Co.*, the discussions in the opinions are largely confined to whether an exception should be made in favor of a foreign holder. There have been some dissents, but the majority of the Appellate Division, First Department, has in each instance sustained the application of the Joint Resolution. One of the finest opinions upon this subject is the one written by Mr. Justice ROSSMAN of the New York Supreme Court in *Zurich General Accident & Liability Ins. Co., Lim. v. Lackawanna Steel Co.*, reported 164 Misc. 498, 299 N. Y. Supp. 862.

III.

The decision of the Circuit Court of Appeals below did not depart from the accepted and usual course of judicial proceedings in bankruptcy.

Surely the Petitioner is not sincere in the assertion made by it on page 14 of its petition that the decision of the Court below departed so far from the accepted and usual course of judicial proceedings in bankruptcy as to call for an exercise of this Court's power of supervision. The Court below determined the legal question upon the record, affirming the decision of the District Court, in accordance with the weight of judicial decision.

IV.

The case was decided correctly by the Court below.

The opinion of the Eighth Circuit Court of Appeals, written by Judge STONE, is well reasoned and clearly expressed. It requires no defense from counsel, but we shall comment upon some erroneous assertions and misconstructions made by Petitioner.

On pages 20 and 21 of its brief, under Point I of its argument, Petitioner argues that because of its attempt in 1936 to exercise the bondholders' option to receive guilders, the bonds should be regarded as having never been payable in dollars.

On June 5, 1933, the date of the passage of the Joint Resolution, no option had been exercised to receive guilders. The bonds were then payable in money of the United States.¹ The Joint Resolution dealt with all contracts so payable from its effective date and attached certain consequences. One such consequence was that such a contract was thereafter payable, dollar for dollar, in United States legal tender. This command of public policy could not thereafter be defeated by an election to take guilders instead of dollars. Upon the date of the statute the bonds fitted the statutory definition.

Under Point II of its Argument, page 23 of its brief, the Petitioner is wrong in stating that it was solely the fact that the amounts of the foreign moneys mentioned in the bonds were then equivalent to \$1,000 of United States gold coin that prompted the Court below to conclude that the foreign moneys mentioned in the foreign

¹This would seem to be true, whether the bonds were regarded as primarily payable in United States money, i. e., so payable if no election is made, as found below (R. 141), or if the option to receive dollars or guilders be regarded as of equal rank. In either case, the bonds may be paid in money of the United States, are capable of being so paid, and thus are payable therein within the applicable definitions of the word "payable" as set forth in the opinion of the Court below.

money options were intended as the equivalent of \$1,000 of United States gold coin of the standard of weight and fineness as it existed January 1, 1912. This fact was of importance in reaching that conclusion, but there were also other significant facts. Some of these facts were: (a) the express statement in the mortgage that the foreign moneys mentioned in the options should be the equivalent of \$1,000 in United States gold coin of the standard of weight and fineness existing on January 1, 1912 (R. 39, and *supra*, p. 3); (b) the lack of any relationship of the transaction to any foreign money or of any suggestion why the holders of the bonds should desire foreign money except to convert into United States money; (c) the nationality of the debtor, and of the purchasers of the bonds; (d) the fact that bonds were to be issued under the mortgage indenture in a principal amount as expressed in United States money equal to expenditures in such money (R. 133).

On pages 24 and 25 of its brief, the Petitioner places in juxtaposition quotations from the decision below and from Judge LEARNED HAND's opinion in the *Anglo-Continental Treuhand* case as if they were opposed. But whatever may be said of the cases as a whole there is no contradiction in the quotations. Judge STONE is pointing out that the foreign moneys were fixed in value as tantamount to the United States gold coin called for by the bonds. Judge LEARNED HAND is pointing out that the guilders were not gold; this may be assumed, but it does not follow that gold coin was not the measure for the number of guilders specified. Nor does the Petitioner demonstrate an error in Judge STONE's reasoning by pointing out that there has been a fluctuation in the value of the foreign moneys in relationship to the dollar, during the period which embraced the World War and the recent depression. The facts remain that parties, not genuinely desiring guilders, pounds, marks or French francs as such, secured options to receive specified amounts thereof as an alternate to receiving gold coin, and that the amounts which they could

tionally receive of such foreign moneys were fixed as amount to the value of the gold coin promised. The equivalence was intended, and the contract is not to be void because it is partly frustrated by conditions. So as the Petitioner's claim in respect to Dutch guilders concerned, it may in truth preserve to the Petitioner approximately the equivalent in value of the 1912 United States gold coin because the guilder remained at its pre-war value until September 27, 1936 (R. 140).

The Court below did not say that the bond contracts were voided into, in an attempt to evade the Joint Resolution, which was not passed until many years later. It did say that the exercise of the foreign money options, if allowed, would present the same evil as the enforcement of the gold clause. This is indubitably true. Petitioner attempts to reach this conclusion, under Point III of its Argument, on the doubtful assertion, on page 28 of its brief, that the shortage of gold in 1933 created the necessity to pass the Joint Resolution into being, and thus attempts to draw the inference that only contracts which call for the payment of gold coin should come within the reach of the Joint Resolution, but, as is clear from the Joint Resolution, and as has been pointed out by members of this Court, the Joint Resolution condemned alike gold coin contracts and gold value contracts, and contracts which increased the amount of currency to be paid by a debtor to a creditor because of the devaluation of the United States dollar were hit by the Joint Resolution as well as contracts which called for gold specie.

One of the purposes of the Joint Resolution was to make the dollar a legal tender in United States legal tender, dollar for dollar, an agreement by a debtor, who had borrowed United States gold coin, to repay that amount of gold coin or an increased amount of United States currency compensating for a devaluation of the United States monetary unit. It follows that there is little reason not to uphold the Joint Resolution to an agreement by one who borrowed United States gold coin, to repay that

amount of gold coin, or to pay an increased value in another medium (which must be translated into United States currency) in order to compensate for the devaluation of the United States dollar. Judge STONE stated this very forcibly in his opinion below (R. 253), as follows:

“Thus by running around an international stump—passing through Holland en route—the holder of every bond and coupon enriches himself substantially at the expense of the debtor and of other creditors. Here, the same result (with further saving of exchange charges) is reached merely through a formal demand in Holland for payment (known to be futile) and by a simple mathematical calculation. Also, this in a situation where no payment is possible but where the above advantage will increase the indebtedness of the debtor and, therethrough, the participation of these holders in the property reorganization at the expense of every other person financially interested in that property.”

Certainly we cannot believe that there is any constitutional objection, as argued under Point IV of Petitioner's Argument, to the application of the Joint Resolution to either type of contract. If there is any constitutional question we believe that it would arise if an interpretation is given the Joint Resolution which arbitrarily discriminates between different types of contracts accomplishing the same end, to-wit, compensation in a United States money contract, at the expense of the debtor, for monetary devaluation. In this case the Respondent Southern Pacific Company, holding bonds of the St. Louis Southwestern Railway Company containing the gold clause, has urged throughout that an arbitrary and unreasonable classification would exist if the Joint Resolution be so construed that the holders of the St. Louis Southwestern Railway Company bonds involved in this case should be compensated for the depreciation of the United States dollar at the expense of other creditors who had also bargained for protection against such depreciation through the gold clause.

CONCLUSION.

It is submitted that the petition should be denied.

Dated: October 17, 1938.

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1938.

No. 384.

GUARANTY TRUST COMPANY OF NEW YORK, as Trustee
Under St. Louis Southwestern Railway Company First
Terminal and Unifying Mortgage Dated January 1, 1912,
Petitioner,
against

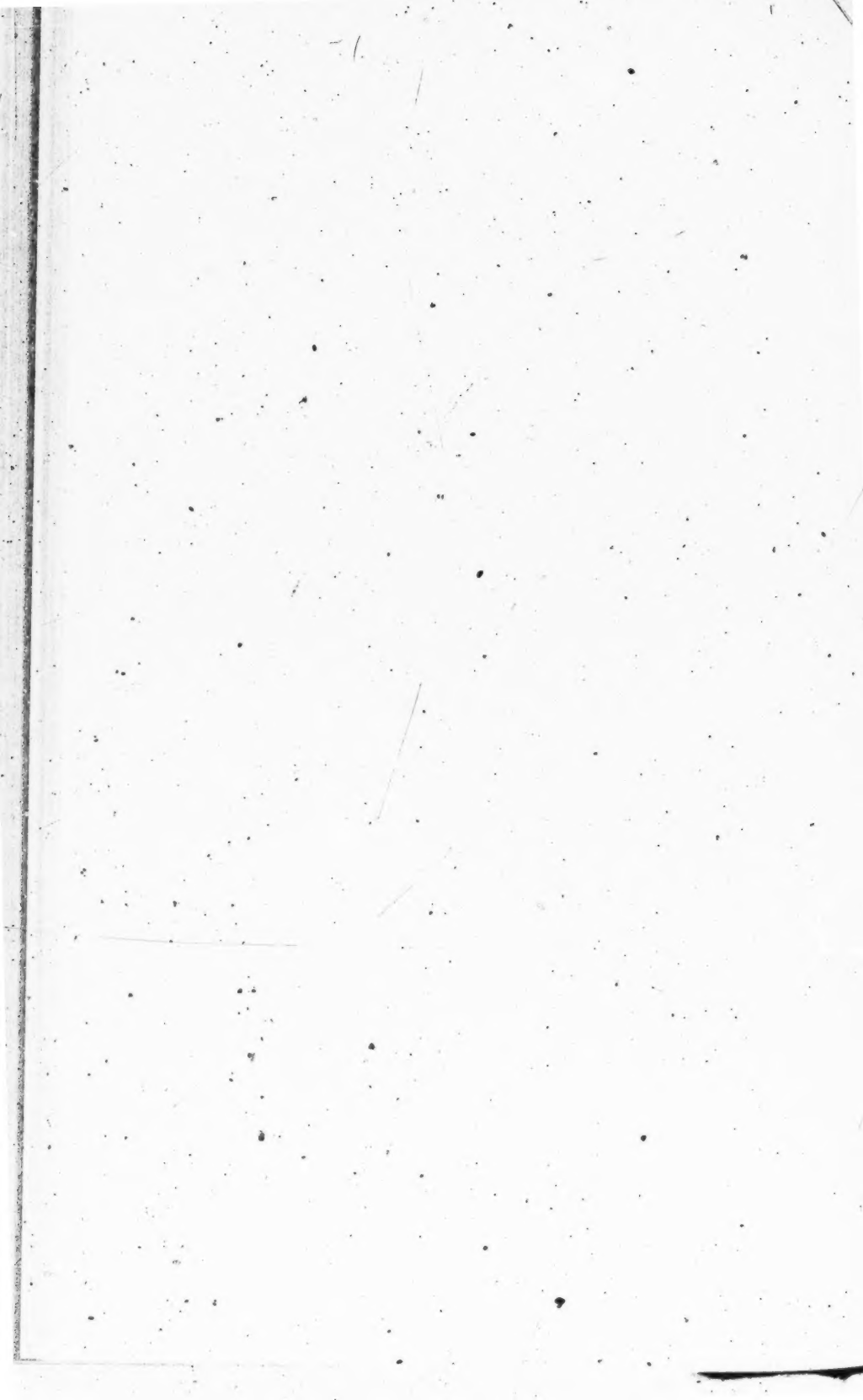
BERRYMAN HENWOOD, Trustee of St. Louis Southwestern
Railway Company, Debtor, **ST. LOUIS SOUTHWESTERN
RAILWAY COMPANY**, and **SOUTHERN PACIFIC COM-
PANY**,
Respondents.

On Certiorari to the United States Circuit Court of Appeals
For the Eighth Circuit.

BRIEF

For Respondent **Berryman Henwood**, Trustee.

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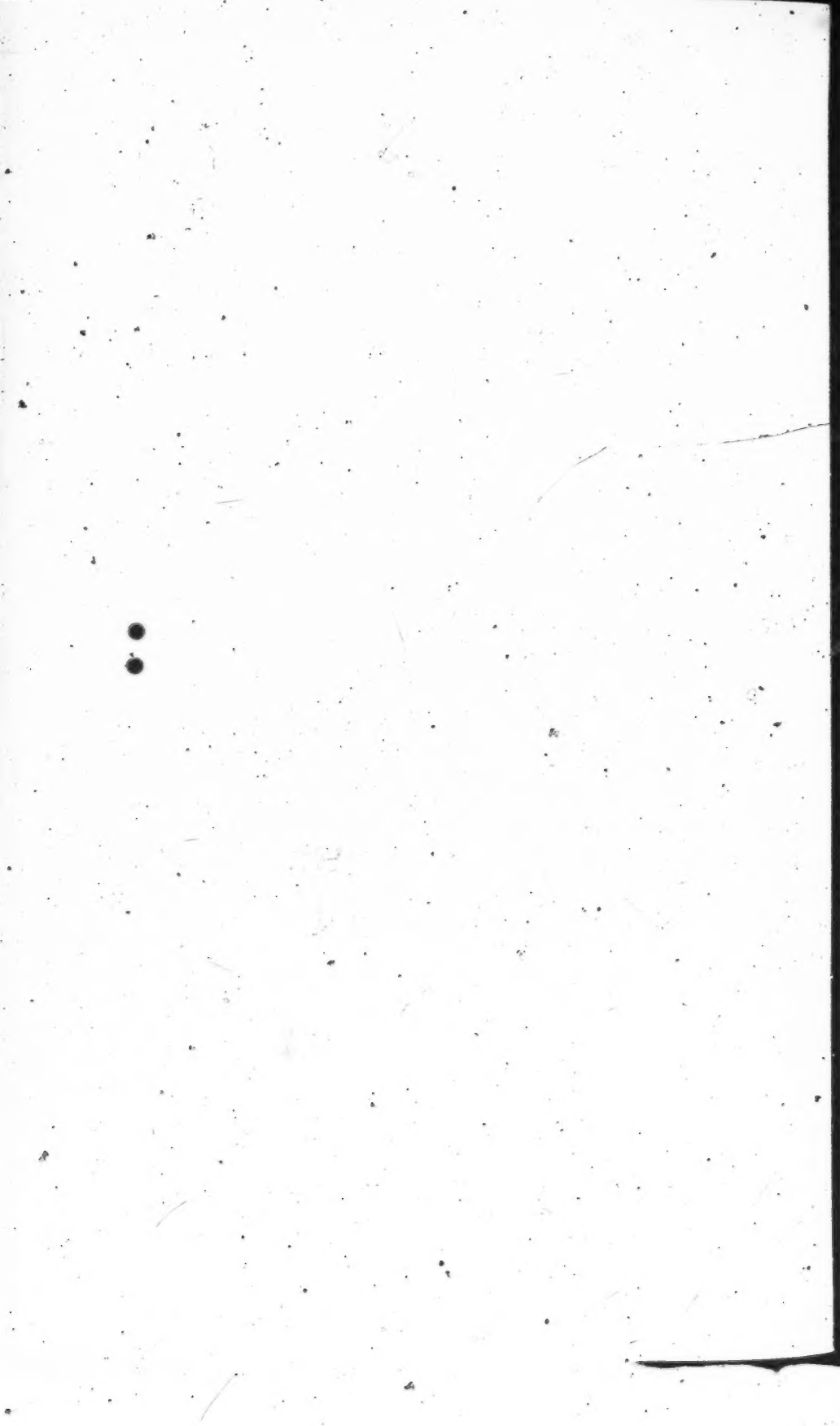
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IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1938.

No. 384.

GUARANTY TRUST COMPANY OF NEW YORK, as Trustee
Under St. Louis Southwestern Railway Company First
Terminal and Unifying Mortgage Dated January 1, 1912,
Petitioner,
against

BERRYMAN HENWOOD, Trustee of St. Louis Southwestern
Railway Company, Debtor, ST. LOUIS SOUTHWESTERN
RAILWAY COMPANY, and SOUTHERN PACIFIC COM-
PANY, Respondents.

On Certiorari to the United States Circuit Court of Appeals
For the Eighth Circuit.

BRIEF

For Respondent Berryman Henwood, Trustee.

OPINIONS BELOW.

The opinion of the Circuit Court of Appeals for the
Eighth Circuit is reported in 98 F. (2d) 160. The District
Court for the Eastern District of Missouri, Eastern Divi-
sion, gave no opinion, but its findings of fact and conclu-
sions of law appear in the record (R. 127-143).

STATEMENT OF THE CASE.

St. Louis Southwestern Railway Company, the Principal Debtor in a proceeding for the reorganization of a railroad in the United States District Court for the Eastern District of Missouri, Eastern Division, is a Missouri corporation (R. 128, 158). As of January 1, 1912, this Debtor executed its First Terminal and Unifying Mortgage, conveying railroad properties in Missouri, Arkansas, Louisiana and Texas, and securing an issue of bonds known as its First Terminal and Unifying Mortgage Bonds (R. 129, 158). Bonds in the total amount of \$21,638,000 were authenticated by Guaranty Trust Company of New York, as trustee under the mortgage, and were delivered to or on the order of the Debtor and are now held by various persons (R. 132, 159). Of this total, \$13,533,000 principal amount of bonds are held by Chemical Bank & Trust Company, successor trustee under the Debtor's General and Refunding Mortgage, as partial security under that mortgage (R. 135, 163). Eight million sixty-three thousand dollars of the bonds are outstanding in the hands of the public.

The bonds held by the public were issued and sold in New York in 1912 to a group of American purchasers, and payment was received in money of the United States (R. 132, 160) in the sum of \$835.00 for each bond (R. 132). These were all coupon bonds.

The coupon bonds issued under the First Terminal and Unifying Mortgage contain a foreign money option clause providing that payment will be made in New York in specified amounts of dollars, or at the option of the holders of the bonds and coupons in London, Amsterdam, Berlin or Paris, in specified amounts of pounds, guilders, marks or francs, respectively. The coupons contain a similar clause. The provisions of the bonds and coupons are correctly quoted by petitioner (Brief, 6-8). These provisions were

inserted pursuant to provisions of the indenture, reading as follows:

“ * * * said bonds, both as to principal and interest, to be payable at the office or agency of the Railway Company in the Borough of Manhattan, in the City and State of New York, in gold coin of the United States of America of or equal to the standard of weight and fineness as it existed January 1, 1912 (the coupon bonds also to be payable, both as to principal and interest, at such places in the following cities in foreign countries as the Board of Directors may from time to time designate, viz.: London, England, or Amsterdam, Holland, or Berlin, Germany, or Paris, France. * * * ”

(R. 130, 18), and (Article First, Section 4, of the Indenture): *

“All or any of the coupon bonds issued hereunder from time to time shall be payable at the office or agency of the Railway Company in the Borough of Manhattan in the City and State of New York, or, at the option of the holders of said coupon bonds, in the cities and countries, respectively, and in the respective currencies stated in the form of coupon bond hereinbefore set forth, but **the face amount of each of such coupon bonds shall be \$1,000 in United States gold coin** of the standard of weight and fineness existing on January 1, 1912, **or the equivalent thereof**, calculated at the rates of exchange stated in the form of coupon bond hereinbefore set forth. The principal amount of First Terminal and Unifying Bonds which the Railway Company shall be entitled to issue under the provisions of this indenture shall be ascertained at the like rate or rates of exchange, and, for all purposes of this indenture and of said bonds, the indebtedness represented by said bonds in United States gold coin, as aforesaid, shall be calculated at the like rate or rates of exchange” (R. 130, 38, 39).*

*Unless otherwise indicated, emphasis in this brief is supplied.

terest on 5,636 bonds, said allowance being \$1,000 for each of the bonds as principal, plus interest at the rate of 5 per cent per annum from July 1, 1935, to December 12, 1935, and disallowed the claim for any additional sum (R. 125). The Circuit Court of Appeals affirmed the District Court's judgment (R. 254).

QUESTIONS PRESENTED.

Petitioner's claim rests upon the propositions that (1) the option contained in the bonds for payment in a stated number of guilders or other foreign moneys at the option of the holders of the bonds is valid and enforceable; (2) such option when not exercised by the holders may be and has been exercised by the trustee under the mortgage; and (3) the value of the guilders sought to be recovered should be fixed at the date of the adjudication of the Debtor as a bankrupt or at the date of the demand for payment in guilders, and not at the value as of the date of the judgment allowing the claim, if allowed, or at the value as of the date of the confirmation of the plan of reorganization.

The courts below decided against the petitioner upon the first point, and consequently it was unnecessary for them to consider the second and third points necessary to sustain the petitioner's claim.

A fair statement of the question of law answered affirmatively by the District Court and the Circuit Court of Appeals is the following:

"Does the Joint Resolution of Congress of June 5, 1933, directing that every obligation payable in money of the United States, heretofore or hereafter incurred, shall be discharged upon payment, dollar for dollar, in any coin or currency of the United States which at the time of payment is legal tender for public and private debts, direct the manner of discharge of bonds

sold in 1912, payable in 1952, by an American corporation to American purchasers in consideration of American money loaned in a transaction in no way related to money of any foreign country, where the bond contract when read with the mortgage indenture was to pay \$1,000 in United States gold coin of the standard of weight and fineness as it existed January 1, 1912, or the equivalent thereof in specified amounts of foreign moneys at the holder's option?"

It is our position that none of the petitioner's propositions is sound. If this Court should disagree with the courts below as to the application of the Joint Resolution, it will be necessary for the other points to be decided.

In order to sustain the petitioner's position upon the second point, it would be necessary for the Court to answer the following question in the affirmative:

"Where, by the terms of the bonds, coupons and indenture of mortgage, the option to receive guilders instead of dollars was specifically reserved to the holders of the bonds and was not conferred upon the mortgage trustee, may the mortgage trustee elect to take guilders in behalf of the bondholders who have refrained from making such an election upon their own account and who have not authorized the mortgage trustee to make such an election for them?"

From the first, the respondents have contended that this question must be answered in the negative.

If the two preceding questions in this case should be decided in favor of the petitioner, an important question remains as to the measure of damages. This question may be stated as follows:

"Where an American corporation, which has agreed to pay guilders in Holland at the creditors' election, has filed a petition for reorganization under Section 77

of the Bankruptcy Act, upon what date (assuming that such election may be and has been validly exercised) is the value of the guilder to be taken in determining the rights of the guilder claimants?"

The respondents contend that as the place for the payment of guilders is abroad, the claim therefor should be translated into dollars by applying the "judgment-date rule."

Petitioner states its belief that this Court will not desire to consider questions not concerning the Joint Resolution, because they were not considered below. This is not a case where a court below made findings of fact contrary to the respondents and review thereof is sought by the respondents without filing a cross petition as in **Guaranty Trust Company of New York v. United States**, 304 U. S. 126, 144, cited by the petitioner. On the contrary, the lack of power of the petitioner to elect payment in guilders is a further ground for supporting the judgment of the District Court, as affirmed by the Circuit Court of Appeals. There was no ruling against the respondents upon this point, and the respondents therefore could not have filed a cross petition with this Court. The question of damages arises necessarily if the other points made by the respondents are rejected. Both points were insisted upon by respondents from the first (R. 110, 111, 143, 150).

The petition for certiorari related only to the construction of the Joint Resolution. The respondents' brief in opposition thereto pointed out that the other questions were in the case and would have to be considered if the petition for certiorari should be granted without limitation. The petition was granted without limitation. The Supreme Court may consider any point in the record which would sustain the judgment of the courts below, regardless of whether such point was accepted in the opinions of such courts. **Langnes etc. v. Green**, 282 U. S. 531; **Story**

Archmont Co. v. Paterson, 282 U. S. 555; **Stelos Co. v. Mosiery Motor-Mend Corp.**, 295 U. S. 237; **Robertson and Kirkham, Jurisdiction of the Supreme Court of the United States**, pages 804, 805.

This case does not come within the rule that this Court will not consider questions presented by the petitioner in argument or brief and decided by the court below and not presented by it in a petition for certiorari (see **Connecticut Railway & Lighting Co. v. Palmer et al.**, U. S. Supreme Court, decided January 3, 1939), because respondents, by pointing out the existence of these questions in their brief in opposition to certiorari, have done all that they could to bring the matter to the Court's attention, and certainly the petitioner cannot arbitrarily restrict the grounds which may be urged in support of the judgment limiting the claim of the petitioner to the amount of its United States dollar face.

If the rule be that the Supreme Court may exercise its discretion as to allowing briefs and arguments on the additional points, such discretion should be exercised in favor of such allowance in this case, because of the desirability of speedy determination of all litigation in Section 77 reorganization proceedings.

The stipulation and findings of the District Court recite numerous facts which show that the proceeds were to be used for specified purposes in this country (R. 160-163, 133). The Debtor's First Terminal and Unifying Bonds were issued to evidence the Debtor's liability for the repayment of sums of United States money borrowed; they were not issued upon a sale or purchase of guilders or other foreign money; the provisions contained in the bonds for optional payment in guilders or other foreign moneys were an assurance, in addition to the "gold clause" contained in the bonds, to the holders thereof against a depreciation in the value of the United States dollar; and the amount of guilders mentioned in the bonds was at the time of the issuance of the bonds the equivalent of \$1,000 United States gold coin of the standard of weight and fineness as it existed on January 1, 1912, and it was understood and specified in the indenture under which the bonds were issued that the amounts of guilders, pounds, francs or marks mentioned in the bonds were each the equivalent of United States gold coin in said amount and of such standard of weight and fineness (R. 134, 160-163, 165-168).

Because of monetary conditions in the several countries involved, there would have been no substantial advantage to the mortgage trustee or bondholders to claim payment in pounds, marks or francs, but a claim for 2,490 guilders on each \$1,000 bond, if sustained, as of one of the dates mentioned by petitioner, would result in a premium of about 70 per cent on the face amount of the bonds and coupons over and above the principal dollar amount thereof (R. 140, 164). The claim on each \$1,000 bond would increase to \$1,687.722, with interest, and the aggregate indebtedness (if the guilder claims should be sustained for the entire issue) would increase from \$21,638,000 to \$37,335,525.12. Upon the bonds represented by the petitioner concerned in this case, the indebtedness would increase from \$5,636,000 to \$9,512,001.19. This situation resulted

from the legislative and executive action in 1933 which brought about a decrease in the gold content of the United States dollar, while the gold content of the guilder remained unchanged until September 27, 1936 (R. 167).

The guilder is the monetary unit of Holland (R. 137, 165). When the bonds were issued the guilder was worth \$.4020 (R. 140, 168) and \$1,000 would buy 2,490 guilders, the exact number specified in each of the coupon bonds. At the date of the execution of the stipulation in the District Court (November 8, 1937) the exchange value of the guilder was \$.5560 (R. 140, 165), and is now less. However, the exchange value of the guilder in terms of the dollar was considerably higher on several dates between 1933 and the date of execution of the stipulation. In this connection certain other dates may become important in respect of this claim, and the parties have stipulated that on each of the dates in question the exchange value was \$.6778 (R. 140, 164). It has been stipulated that this was the exchange value on December 12, 1935, the date on which the Debtor's reorganization petition was filed; on May 5, 1936, the date as of which the Guaranty Trust Company of New York accelerated the maturity of the bonds; and on September 24, 1936, the date on which the Guaranty Trust Company of New York executed its proof of claim (R. 140, 164, 165). This premium was occasioned by the diminution of the gold content of the United States dollar, while the gold content of the Dutch guilder remained constant.

The mortgage provides that certain of the bonds are payable at the offices of the Debtor in the several foreign countries named. The Debtor, however, has never maintained an office or agency in Amsterdam, Holland, for the payment of interest or principal on these bonds, or at any of the other foreign cities named (R. 132, 159). As a matter of fact, there was no demand for payment in guilders

SUMMARY OF ARGUMENT.

I.

The First Terminal and Unifying Mortgage Bonds are Payable, Dollar for Dollar, in Coin or Currency of the United States Which at the Time of Payment Is Legal Tender for Public and Private Debts, Irrespective of the Foreign Money Options Contained in the Coupon Bonds, by Reason of the Joint Resolution of Congress of June 5, 1933, Which Permits the Discharge of All Obligations Payable in United States Money in Such Legal Tender.

(A) The monetary legislation initiated in 1933, designedly accomplished a reduction in the equivalent of the United States dollar in gold and in foreign exchange, and the Joint Resolution of Congress of June 5, 1933, was adopted to relieve debtors who had guaranteed against such monetary reduction from the burden of their assurances, and without such relief devaluation of the dollar would not have been undertaken.

(B) The Joint Resolution provides that these bonds shall be discharged, dollar for dollar, in any coin or currency of the United States which at the time of payment is legal tender, irrespective of the other provisions for payment or discharge contained in the bonds.

1. The word "obligation," as used in the statute, means the bond or coupon or other contract as a whole, rather than particular provisions contained therein.

2. Bonds are "payable in money of the United States," within the meaning of the Joint Resolution, if payable in United States money at the unrestricted election of the obligee, although the obligee may have the option to re-

quire an alternative performance in gold, foreign moneys, or other commodities.

3. Every obligation payable in money of the United States is to be discharged upon payment, dollar for dollar, in current legal tender, irrespective of the other provisions contained therein, and the Joint Resolution may not be confined to the invalidation alone of the conventional gold clause.

4. A review of the authorities dealing with the Joint Resolution pertinent to obligations containing foreign money options indicates that the United States Supreme Court decisions support the decisions of the courts below, and that the holdings of other courts are divided.

5. The First Terminal and Unifying Bonds involved here are primarily United States money obligations, dischargeable as directed by the Joint Resolution, and the foreign moneys mentioned in the foreign money options were intended as equivalents of the United States gold coin called for by the bonds and coupons.

(C) As applied to the facts of this case, the arguments in petitioner's brief are not persuasive.

II.

Assuming That the Guilder Option Is Valid, Guaranty Trust Company of New York, as Mortgage Trustee, Had and Has No Right Under the Terms of the Bonds, Coupons or the Mortgage, or Under Amendatory Section 77, to Make an Election on Behalf of Holders of Any of the Bonds or Coupons for Guilders or Any Other of the Several Foreign Moneys Mentioned in the Mortgage, the Election Being Specifically Reserved by the Terms of the Bonds, Coupons and the Mortgage to the Holders of the Bonds and Coupons.

prior to June 5, 1933, the date of the Joint Resolution of Congress, 48 Stat. 112, 31 U. S. C. A., Section 463 (R. 134, 198). Believing that the Joint Resolution banned payments in foreign moneys, the Debtor did not provide for the payment of the bonds or coupons in any currency other than that of the United States, and it had no foreign paying agent at any time (R. 132, 180).

As the stipulation recites (R. 159), the petitioner, although it did not have the bonds in its possession, caused certain acts to be done in Holland purporting to elect payment of all of the First Terminal and Unifying Mortgage Bonds in guilders (R. 137). In June, 1936, petitioner published a notice in certain newspapers of its intention to signify an election to receive guilders and to file a claim for guilders (R. 137, 177). These acts were done by petitioner as trustee under the mortgage (R. 137, 160). The purported guilder election was by means of these acts and by the making and filing of the proof of claim and supplement thereto (R. 137, 159).

On May 5, 1936, pursuant to a petition of the railway Trustee, Guaranty Trust Company of New York, trustee, was enjoined by the District Court from accelerating the maturity of the bonds, such acceleration having been proposed because there had been defaults under the mortgage. The Circuit Court of Appeals reversed and remanded the injunction order and this Court denied certiorari. By order of the District Court on February 24, 1937, the injunction was dissolved (R. 136, 163), and, pursuant to that order, petitioner, on February 25, 1937, served a notice upon the railway Trustee and the Debtor to the effect that the principal of all of the bonds was due and payable immediately as of May 5, 1936 (R. 136, 163). In addition to this notice, petitioner, on March 15, 1937, filed its supplemental proof of claim, which also stated that the maturity of the bonds was accelerated as of that date (R. 104).

By far the largest amount of First Terminal and Unifying Bonds are held by citizens and residents of the United States or by domestic corporations (R. 135, 163, 198). In fact, in this case we are dealing exclusively with the rights of American holders (R. 135). Petitioner filed a claim under this mortgage (R. 2) and a supplement thereto (R. 104). This was a blanket claim which purports to cover all bonds issued under the First Terminal and Unifying Mortgage, and is a claim for 53,878,620 guilders. The proof of claim states, however, that the amount of the claim shall be reduced to the extent that valid individual proofs of claim are filed on behalf of bonds or coupons by the holders thereof, and by the amount by which the value of guilders exceeds the value of any money other than guilders which any holder or holders of the bonds or coupons elect to receive in respect thereof (R. 106). It follows that we are now considering only the rights of bondholders who have not filed separate claims. The claims of certain foreign holders have been filed separately, have been heard and are pending before a Special Master appointed by the District Court. The claim upon the \$13,533,000 of pledged bonds was filed separately and is pending before this Court in Case No. 495, **Chemical Bank & Trust Co., Trustee, v. Henwood.**

To the claim of petitioner for guilders three protests were filed, one by Berryman Henwood, Trustee, representing all creditors (R. 106, 120); one by the Debtor (R. 112, 121), and one by Southern Pacific Company, a stockholder and creditor of the Debtor (R. 113, 122).

No other mortgage of the Debtor contains a foreign currency option clause similar to that contained in the First Terminal and Unifying Mortgage, although the other mortgages do contain gold clause provisions (R. 129, 168).

The District Court allowed the petitioner's claim in the amount of \$5,635,000 for principal and \$126,027.16 for in-

III.

If It Should Be Determined That the Bonds Are Payable in Guilders, Damages Are to Be Based on the Exchange Value of the Guilder in Terms of the United States Dollar As of the Judgment Date, i. e., When the Claim for Guilders Is Translated by the Action of the Reorganization Court Into Dollars.

(A) In a proceeding in this country to recover upon a contract to pay foreign moneys in a foreign country, the value of the foreign moneys is determined as of the date of the judgment.

(B) Applying the judgment-date rule to this Section 77 reorganization proceeding of a railroad, the guilder should be taken at either its face value upon the date of the judgment allowing the claim or upon the date of the order confirming the plan of reorganization.

(C) The contention of the petitioner that the value of the guilder should be taken at the date of the filing of the petition in reorganization may not be accepted because (1) based upon cases concerned with ordinary bankruptcies or insolvency proceedings where the petition date is given a significance lacking in a Section 77 proceeding; (2) not supported in fact by the cases cited even in ordinary bankruptcies or receiverships; and (3) impracticable of operation upon the particular facts of this case.

ARGUMENT.

I.

THE FIRST TERMINAL AND UNIFYING MORTGAGE BONDS ARE PAYABLE, DOLLAR FOR DOLLAR, IN COIN OR CURRENCY OF THE UNITED STATES WHICH AT THE TIME OF PAYMENT IS LEGAL TENDER FOR PUBLIC AND PRIVATE DEBTS, IRRESPECTIVE OF THE FOREIGN MONEY OPTIONS CONTAINED IN THE COUPON BONDS, BY REASON OF THE JOINT RESOLUTION OF CONGRESS OF JUNE 5, 1933, WHICH PERMITS THE DISCHARGE OF ALL OBLIGATIONS PAYABLE IN UNITED STATES MONEY IN SUCH LEGAL TENDER.

As stated above, the discrepancy between the value of the dollar and the guilder was brought about by certain legislative and executive action in 1933. Let us consider these acts in their chronological order before considering in detail the Joint Resolution of Congress of June 5, 1933, and its application to the facts in light of the decisions.

(A) The Monetary Legislation Initiated In 1933 Designedly Accomplished a Reduction in the Equivalent of the United States Dollar in Gold and In Foreign Exchange, and the Joint Resolution of Congress of June 5, 1933, Was Adopted to Relieve Debtors Who Had Guaranteed Against Such Monetary Reduction From the Burden of Their Assurances, and Without Such Relief Devaluation of the Dollar Would Not Have Been Undertaken.

The circumstances which led to the passage of the Joint Resolution are well known. In order to ascertain the intent of the legislative and executive branches of the gov-

ernment it will be helpful to consider not only the economic situation prevailing at the time, but also the legislation and executive proclamations which undertook to direct the country's financial and monetary policies. **Barrett v. Van Pelt**, 268 U. S. 85, 91; **Rhodes v. Iowa**, 170 U. S. 412, 422.

The legislation and proclamations have been reviewed in detail by Mr. Chief Justice Hughes in his opinion in **Norman v. B. & O. Railroad Company**, 294 U. S. 240, l. c. 245-297. As will appear upon a review of these actions, it is apparent that at the time the Joint Resolution was passed Congress had in mind devaluation of the gold content of the dollar and the establishment of a uniform currency.

On March 6, 1933, redemption in specie of United States money was suspended. Three days later, on March 9, 1933, the same control was given to the President over foreign exchange as over gold transactions. **Emergency Banking Relief Act**, 48 Stat. 1. See **Norman v. B. & O. Railroad Company**, *supra*, 295.

On May 12, 1933, was enacted the **Agricultural Adjustment Act**, 48 Stat. 31, whereby devaluation of the dollar was first authorized, and authority was conferred on the President in Section 43 "to fix the weight of the gold dollar in grains nine-tenths fine, and also to fix the weight of the silver dollar in grains nine-tenths fine at a definite fixed ratio in relation to the gold dollar at such amounts as he finds necessary from his investigation to stabilize domestic prices or to protect the foreign commerce against the adverse effect of depreciated foreign currencies." It was further provided that the "gold dollar, the weight of which is so fixed, shall be the standard unit of value," and that "all forms of money shall be maintained at a parity with this standard," but that "in no event shall the weight of the gold dollar be fixed so as to reduce its present weight by more than 50 per centum."

On June 5, 1933, the **Joint Resolution**, 48 Stat. 112, was passed. At the time of its passage it was recited that the legislation was directed against provisions in obligations "inconsistent with the declared policy of the Congress to maintain at all times the equal power of every dollar, coined or issued by the United States, in the markets and in the payment of debts."

On January 31, 1934, by **Presidential Proclamation**, the weight of the gold dollar was fixed at 15 5/21 grains of gold nine-tenths fine (48 Stat. 1730), instead of 25.8 grains (31 Stat. 45), the content of the old dollar. The old gold dollar was worth in terms of gold 69.3 per cent more than the new dollar.

Finally, the monetary policy of the United States was crystallized in the **Gold Reserve Act** of 1934, 48 Stat. 337, by which the Secretary of the Treasury was directed to use the stabilization fund arising from the devaluation program for the management of the value of United States money in terms of gold and in terms of foreign exchange. Section 10 (a) of that Act provides, in part, as follows:

"For the purpose of stabilizing the exchange value of the dollar, the Secretary of the Treasury, with the approval of the President, directly or through such agencies as he may designate, is authorized, for the account of the fund established in this section, to deal in gold and foreign exchange and such other instruments of credit and securities as he may deem necessary to carry out the purposes of this section."

It is thus apparent that during all this time, which includes the time when the Joint Resolution was passed, Congress had in contemplation not only the devaluation of the dollar, but also the economic consequences that would flow therefrom, including the effect upon foreign exchange. Mr. Chief Justice Hughes recognized the grounds for this

Congressional action in **Norman v. B. & O. Railroad Co.**, supra, where he stated, at page 314, that "devaluation was in prospect and a uniform currency was intended." He summarized the grounds as follows, page 315:

"The devaluation of the dollar placed the domestic economy upon a new basis. In the currency as thus provided, States and municipalities must receive their taxes; railroads, their rates and fares; public utilities, their charges for services. The income out of which they must meet their obligations is determined by the new standard. Yet, according to the contentions before us, while that income is thus controlled by law, their indebtedness on their 'gold bonds' must be met by an amount of currency determined by the former gold standard. Their receipts, in this view, would be fixed on one basis; their interest charges, and the principal of their obligations, on another. * * * It requires no acute analysis or profound economic inquiry to disclose the dislocation of the domestic economy which would be caused by such a disparity of conditions in which, it is insisted, those debtors under gold clauses should be required to pay one dollar and sixty-nine cents in currency while respectively receiving their taxes, rates, charges and prices on the basis of one dollar of that currency."

In devaluing the dollar and by the other acts referred to, it was evidently the intent of Congress to establish stability and uniformity and to avoid discrimination, but such uniformity could not be attained if debtors, by the provisions of their obligations, could be compelled to pay to one creditor more dollars than to another creditor, or to pay to all creditors more than the face of their obligations as expressed in old dollars.

The effect of the provision contained in a United States money obligation for payment at the holder's option in a foreign gold money is the same as that of the conventional "gold clause." Both clauses, if valid, would permit

the creditor to recover from the debtor an amount equivalent to the gold value of the United States dollar as it existed prior to reduction of its gold content. The amount of the premium in either case is approximately 70 per cent. It requires but an understanding of what the petitioner is seeking in this case to perceive that it is endeavoring to enforce the equivalent of the gold clause.

During all this time and until September 27, 1936, Holland remained on the gold standard and the gold content of the guilder was constant (R. 140, 167). While the guilder was not redeemable internally in gold, a United States citizen could secure gold or the equivalent in value of gold for guilders. The District Court found this to be a fact (R. 140).

Holland was upon what is technically known as the gold export basis. The effect, in the increase of the value of the guilder relative to our money, of the devaluation of the United States dollar, was automatic. The guilder increased in value from \$.4020 to \$.680567, just 69.3 per cent (R. 140, 168). Due to market fluctuations too small to be corrected by the shipment of gold, the market value of the guilder on the dates alleged by the petitioner to be significant was \$.6778 (R. 140, 164). Thus, it is brought out strikingly that the petitioner is seeking to enforce the equivalent of the gold clause. This it cannot do, because it must rely upon an obligation payable in money of the United States and therefore dischargeable, dollar for dollar, in money of the United States.

Taking into consideration the foregoing economic conditions, legislation and proclamations, it may justly be concluded that the purpose of Congress in the Joint Resolution of June 5, 1933, was **to establish stability and uniformity, both domestically and in foreign exchange** and to avoid discrimination as between various classes of debtors and creditors. Congress fully appreciated that in reduc-

ing the gold content of the dollar there would be a proportionate increase in the value of foreign money in relation to United States money. It is apparent that the devalued dollar was to be legal tender in the discharge of all obligations. Let us pass to an examination of the language of the Joint Resolution.

(B) The Joint Resolution Provides That These Bonds Shall Be Discharged, Dollar for Dollar, in Any Coin or Currency of the United States Which at the Time of Payment Is Legal Tender, Irrespective of the Other Provisions for Payment or Discharge Contained in the Bonds.

The Joint Resolution is set forth in Appendix A to this brief. Paragraph (a) of Section 1 of the Joint Resolution, with the definitions appearing in paragraph (b) inserted in parentheses, reads as follows: .

“Every provision contained in or made with respect to any obligation (payable in money of the United States) which purports to give the obligee a right to require payment in gold or a particular kind of coin or currency (of the United States), or in an amount in money of the United States measured thereby, is declared to be against public policy; and no such provision shall be contained in or made with respect to any obligation (payable in money of the United States) hereafter incurred. Every obligation (payable in money of the United States), heretofore or hereafter incurred, whether or not any such provision is contained therein or made with respect thereto, shall be discharged upon payment, dollar for dollar, in any coin or currency (of the United States) which at the time of payment is legal tender for public and private debts.”

It is submitted that since each of the First Terminal and Unifying Bonds is an “obligation,” “payable in money

of the United States," as referred to in the second sentence of Section 1 of the Joint Resolution, each of said bonds is required to be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts, irrespective of the provisions for payment in Dutch guilders or other foreign moneys. Each of these bonds is required and permitted to be discharged in one thousand dollars of the present money of the United States.

1. The Word "Obligation," as Used in the Statute, Means the Bond or Coupon or Other Contract as a Whole, Rather Than Particular Provisions Contained Therein.

The word "obligation," as used in the statute, means the bond, coupon or other contract as a whole, as distinguished from "provisions" contained in such instruments (R. 141). This conclusion is evident from the language of the Joint Resolution, in the second paragraph of the preamble of which reference is made to "provisions of obligations." In the first sentence of subdivision (a) thereof the reference is to "every provision contained in or made with respect to any obligation." Manifestly, Congress was distinguishing between the **provisions** which may be contained in a bond, coupon or other obligation, and the bond, coupon or other **obligation itself**. It would be meaningless to refer to a "provision contained in an obligation," when the "provision" itself is the "obligation" in question.

This Court, in the cases that have come before it involving the Joint Resolution, has assumed that the word "obligation" referred to the bond or other contract, rather than to particular provisions or promises contained therein. Thus, in **Norman v. B. & O. Railroad Co.**, *supra*, the Court at page 313 referred to the "volume of obligations with gold clauses," and also said: "If there were no outstanding obligations with gold clauses * * *" and at page 315

said: "It is common knowledge that the bonds issued by these obligors have generally contained gold clauses, and presumably they account for a large part of the outstanding obligations of that sort." In **Perry v. United States**, 294 U. S. 330, at page 348, this Court, referring to a Liberty Bond issued by the United States, said: "The bond now before us is an obligation of the United States," and on the same page: "The bond in suit differs from an obligation of private parties, or of States or municipalities, whose contracts are necessarily made in subjection to the dominant power of the Congress." The dissenting judges in the **Gold Clause Cases** took no different view. At page 362 of 294 U. S., the dissenting opinion said: "By the so-called gold clause—promise to pay in 'United States gold coin of the present standard of value,' or 'of or equal to the present standard of weight and fineness'—found in very many private and public obligations, the creditor agrees to accept and the debtor undertakes to return the thing loaned or its equivalent." And, again, at page 368, the opinion reads: "Four causes are here for decision. Two of them arise out of corporate obligations containing gold clauses—railroad bonds.".

"Obligation" is a word of several legal meanings and is often used in a sense which includes more than one of these meanings. The word may embrace the agreement, the duty of performing as agreed, and the written instrument of agreement. The **New English Dictionary (Oxford, 1909)** defines "Obligation," legally, as

"An agreement, enforceable by law, whereby a person or persons become bound to the payment of a sum of money or other performance; a document containing such an agreement; especially in English law, a written contract or bond under seal containing a penalty with a condition annexed."

In **Munzinger v. United Press**, 52 App. Div. 338, 341, 65 N. Y. Supp. 194, 196, the court said:

"The word 'obligation' originally meant a bond containing a penalty with a condition for the payment of money or to do or suffer some act or thing (Co. Litt. 172a). The meaning of the word, however, has gradually been enlarged by the courts, and it has ceased to be restricted to a bond or writing obligatory, and has been extended to mean a paper by which some fixed duty is assumed to be performed at a certain time, or an instrument in writing whereby one party contracts with another for the payment of money at a fixed date or for the delivery of specific articles. But however various have been the definitions given to the word, the one essential element has always been that it must be a written paper, the duty assumed by which must be a fixed duty (Bouv. L. Dict., title 'Obligation'; *Sinton v. Carter Co.*, 23 Fed. 535; 17 Am. & Eng. Enc. of Law, 2, 3; *Basehore v. Rhodes*, 85 Penn. St. 44, 46; *Strong v. Wheaton*, 38 Barb. 616-624; *State v. Campbell*, 103 N. C. 344, 347)."

See, also, **Ballentine's Law Dictionary** (1930), p. 895.

It is not necessary to say whether Congress in the Joint Resolution used "obligation" as indicating the instrument or the duty arising from the instrument, and in fact the term was probably used in both senses. In any event, it is clear that the word "obligation" was used to mean the whole bond contract payable in United States money, as distinguished from provisions therein. This is indubitable. It follows from the very language of the Joint Resolution itself. "Obligation," as used in the statute, means the whole of any money contract and includes a provision in a money contract for a discharge of the obligation by delivery of gold bullion. It is not inconsistent with legal terminology for Congress to contemplate a single

obligation containing provisions for alternative performances. From 3 **Bouvier's Law Dictionary** (3rd Rev.), page 2393, we quote:

"In order to constitute an alternative obligation it is necessary that two or more things should be promised disjunctively; where they are promised conjunctively, there are as many obligations as the things which are enumerated; but where they are in the alternative, though they are all due, there is but one obligation, which may be discharged by the payment of any one of them."

That the word "obligation" includes alternative promises was the express holding of this Court in **Holyoke Water Power Co. v. Paper Co.**, 300 U. S. 324, 337, where it is said:

"But if both modes of payment had been preserved, the second equally with the first would have been effective to discharge the obligation."

The petitioner is patently wrong in its contention that the word "obligation" is restricted to a duty absolutely and solely payable in money of the United States. By its very terms and by the interpretation given it by this Court, the word includes such an obligation which contains also an alternative provision for performance. Petitioner argues that there was no obligation on June 5, 1933, when the Joint Resolution became effective, or indeed at any time prior to bankruptcy, because there was no absolute liability on the part of the Debtor to pay in dollars, pounds, marks, guilders or francs. Contrary to this suggestion, the obligation arises at the time of the promise, although liability for breach does not accrue until election. The distinction is expressed in **Williston, Contracts** (Rev. Ed., 1936), Section 44, page 129, as follows:

"Sometimes this choice on the part of the promisee

must be exercised when the offer is accepted. In other cases the option need not be exercised until the time for performance of the contract. Such a choice is often given in regard to the time of performing a contract. So the place of performance, the quantity of goods to be sold or bought, the kind of goods, the method of shipment, or any other matter, may be left optional to the promisee. But though such promises may give rise to a binding **obligation** at the time of the promise, if consideration is given, no **liability** can arise for breach of them until the promisee exercises his option and gives notice of his choice to the promisor."

The use of the word "obligation" to include "debt" in this Court's opinion in **Holyoke Water Power Co. v. Paper Co.**, supra, is not improper, as in one sense "obligation" does include a "debt." It does not follow that its meaning generally, or as used in the Joint Resolution, is confined to "debt."

We submit that the District Court below correctly stated the law when it said that the word "obligation," as used in the Joint Resolution, refers to a bond or coupon of the character therein defined, as a whole, rather than to particular "provisions" contained therein (R. 141). The Circuit Court of Appeals assumed this to be true (R. 249). Petitioner admits that this use of the word is permissible (Brief, page 74). The plain meaning of the language used in the Joint Resolution makes such use of the word mandatory. Petitioner's contention (Brief, page 78) that no obligation was incurred defeats itself, for under this theory there would be no debt of any kind.

2. Bonds Are "Payable in Money of the United States," Within the Meaning of the Joint Resolution, If Payable in United States Money at the Unrestricted Election of the Obligee, Although the Obligee May Have the Option to Require an Alternative Performance in Gold, Foreign Moneys, or Other Commodities.

The Joint Resolution reaches the bonds in question because the obligation is "payable in money of the United States." The fact that it is also payable in other moneys does not remove it from the category of obligations "payable in money of the United States."

The District Court correctly said that the word "payable," as used in the Joint Resolution, and as applied to the Debtor's First Terminal and Unifying Mortgage Bonds, means "capable of being paid" (R. 141). The bonds are required to be paid in United States dollars, reserving an option in the holders of the bonds to elect to receive payment in guilders, francs, marks or pounds, and even if the dollar payment be considered as an option equal only in rank to the option to receive payment in the foreign currencies, the bonds are capable of being paid and the Debtor may be compelled to pay in money of the United States, and therefore they are "payable in money of the United States" within the meaning of the Joint Resolution.

When the word "payable" is used descriptively, it ordinarily means "capable of being paid," or "which may be paid." This adjective is constructed by the addition of the suffix "-able" to the verb "pay" and signifies "able to be paid."* **Webster's New International Dictionary** (G. & C. Merriam Co. 1933) contains the following definition of "payable":

*The word "payable," notwithstanding that it sometimes acquires extra significance implied from the circumstances of its use, basically is a descriptive word, one of that group of adjectives formed by the addition of the suffix "-able" to a verb form. Such adjectives denote that the

"Payable: 1 That may, can, or should be paid; justly due. 2 Law. a That may be discharged or settled by delivery of value. b That is to be paid (by any particular person); as, bills payable; also matured or maturing; due."

Funk & Wagnalls' New Standard Dictionary (1913) defines "payable" as follows:

"Payable. 1 Due and unpaid; capable of being discharged by payment; that can or will be paid; justly due; due as to time; as, the note is payable today."

In **22 Am. & Eng. Enc. of Law** "payable" is defined:

"The word 'payable' is a descriptive word, meaning capable of being paid; suitable to be paid; admitting or demanding payment; justly due; legally enforceable."

noun referred to is capable of being acted upon in the designated way. Thus "payable" ordinarily means "capable of being paid." Adjectives ending in "able" are discussed in **Poutsma, A Grammar of Late Modern English** (Groningen, 1926), Part II, Sec. II, pp. 135, 136, as follows:

"Passiveness expressed by other means than the Passive Voice.

"Besides the passive voice the language has several other constructions representing a person or thing as subjected to an activity. . . .

"The force of the passive voice, its power, that is, of representing a person or thing undergoing an activity, may also be traced, in a modified way, in adjectives ending in *able* (or *ible*), the modification consisting in the additional notion that the person or thing referred to may (or should) undergo the action suggested by the adjective. Thus the fruit is *eatable* is approximately equivalent to the fruit may be eaten or is capable of being eaten. The tree is discernible from a fair distance is practically the same as the tree may or can be discerned from a fair distance. In like manner such actions are highly *blam(e)able* may be replaced by such actions should be highly blamed or are to be highly blamed. Only *able* is a living suffix, being freely employed to form new adjectives."

The suffix "*-able*," "*-ible*" or "*-ble*" is defined in **Webster's New International Dictionary** (1932) as:

"An adjective suffix used: (a) Passively with implication of ability, fitness, or worthiness to be acted upon, as *eatable*, *fit to be eaten*; *lovable*, *worthy to be loved*; *readable*, *possible to be read*. This is now the usual sense of the suffix in English. (b) In the sense of tending to, given to, favoring, causing, *able to*, or *liable to*, as *peaceable*, *given to peace*; *perishable*, *liable to perish*; *terrible*, *horrible*, *delectable*, *durable*. Words like *mutable*, *tending to change*, also *able to be changed*, have both the active and the passive senses."

The same definition appears in 6 **Words and Phrases**, 1st Series, 5245, citing **First National Bank v. Greenville National Bank**, 84 Tex. 40, 19 S. W. 334, 335. See also **Gulf Production Co. v. Cruse** (Tex.), 258 S. W. 211, 212.

The closest cases which we have found are those dealing with the requirement of the law merchant that a bill or note to be negotiable must be payable in money, and holding that this requirement is met where the instrument is dischargeable in money or by some other performance at the option of the holder.

In **Hosstatter v. Wilson**, 36 Barbour (N. Y.) 307; it was held that an instrument whereby a maker promises to pay a specified sum, or in goods on demand, was payable in money, the court expressing its holding as follows:

"The essential requisite of a promissory note is that it must be payable in money absolutely and without any contingency * * *. In the present case the debtor promises to pay in money. He has no election to do anything else. If the holder chooses he may surrender the note and receive goods, but that rests entirely with himself and no choice is left to the debtor."

The New York Court of Appeals held to the same effect in **Hodges v. Shuler**, 22 N. Y. 114. This Court came to a like conclusion in **Hotchkiss v. National Bank**, 21 Wall. 354, 358.

It is true that where in a money contract it is stated that money is payable in some particular place or at some particular time, the courts hold that such particular place or time of payment is mandatory. These holdings are to the effect that when the word "payable" is used in a commercial sense it means that which is to be paid, rather than that which may be paid. It does not follow from this that it is a misnomer to say that a contract is payable in one of several ways, or that when the word "payable"

is used in a descriptive sense it does not include that which is capable of being paid as well as that which must be paid. The distinction is well put in **First National Bank v. Greenville National Bank**, 84 Tex. 40, 19 S. W. 334, 335, where it is said:

“The word ‘payable’ is a descriptive word, meaning ‘capable of being paid; suitable to be paid; admitting or demanding payment; justly due; legally enforceable’ (Webst. Dict.) * * *. It becomes a promise to pay only when used in connection with words showing an obligation to pay.”

The word “payable,” as used in **Johnson v. Dooley**, 65 Ark. 71, 44 S. W. 1032, 1033, referred to the only medium of payment prescribed. There was no optional method of payment, and, therefore, this definition cannot apply to the instant case. In fact, the court in that case pointed out that the promise there involved was to pay in specific bonds, and that there was not a “mere privilege or option to pay in bonds.” That is an indication that the court would have decided the case differently had an option existed. The **Johnson** case was cited with approval in **Poppleton v. Jones**, 42 Ore. 24, 69 Pac. 919, 922, which was a similar case involving no optional method of payment.

As to time of payment of a negotiable instrument, it has been held that “payable” means “to be paid.” In the case so defining the word, the court said further: “If a negotiable instrument is payable at one of two banks, it may be presented for payment to either.” **Farmers Bank v. Johnson, King & Co.**, 134 Ga. 486, 68 S. E. 85. It would seem to follow that if an instrument is payable in one of two (or more) currencies, it may be paid in either.

Petitioner (Brief, page 75) cites **Swanson v. Spencer**, 177 Mo. App. 124, 163 S. W. 285, in support of its view

as to the meaning of the word "payable." The clause involved there was "due and payable," and the court, in arriving at the definition of this phrase, considered the respective meanings of the two words and also the "modifying effect of their conjunction to express a composite idea." The definition given there to the word "payable" was limited to its combination with the word "due," which the court found to mean, in that case, that a present right existed in the obligee to enforce payment and a present right in the obligor to discharge the debt by payment. In other words, the phrase used there meant "accrued."

In **Ingram v. Mandler**, 56 F. (2d) 994 (C. C. A. 10), also cited by petitioner, the phrase construed was one appearing in certain notes and reads as follows:

"Privilege granted to pay note in full on 1st day of June or December of any year before maturity, the interest on this note being payable on said dates."

There was no optional payment involved, and the definition given cannot apply to the case at bar. The court construed the word in its commercial sense in connection with a clause which clearly required construction of "payable" as meaning "to be paid."

There is a measure of irony in the contention of the petitioner that the bonds are not payable in money of the United States when the very indenture under which the petitioner is claiming provides that all bonds issued under the indenture are to be so payable (R. 130, 18, 39).

In construing the language of the Joint Resolution as applied to bonds containing a multiple currency clause, Mr. Justice Rosenman said in **Zurich General Accident & Liability Ins. Co., Lim., v. Lackawanna Steel Co et al.**, 164 Misc. 498, 299 N. Y. Supp. 862, affirmed 254 App. Div.

839, reversed, New York Court of Appeals, January 11, 1939:

"The Joint Resolution by its very terms covers 'every obligation,' which is defined as 'every obligation payable in money of the United States.' This language is broad enough to cover these coupons, even though they are alternatively payable in other currencies. If one alternative method of payment is proscribed by the statute expressly, the entire obligation is covered, even though the other alternative may not itself be specifically banned. This is the rule which has been applied to situations where an agreement is framed in the alternative and one of the alternatives is subject to the statute of frauds. The statute is deemed in such cases to include the entire obligation, so that both alternatives contained in the obligation are considered unenforceable. *De Beerski v. Paige*, 36 N. Y. 537. The same principle should be applied to the analogous situation here under consideration."

But need we look farther than the decision of this Court in *Holyoke Water Power Company v. Paper Co.*, 300 U. S. 324? We think not. There we find facts almost identical in this respect to those here present. The leases there involved called for payment of "a quantity of gold which shall be equal in amount to fifteen hundred (\$1500) dollars of the gold coin of the United States of the standard of weight and fineness of the year 1894, or the equivalent of this commodity in United States currency." These leases were held to have been reached by the provisions of the Joint Resolution. The only conclusion that can be drawn from the decision is that this Court without doubt considered "payable" to mean "capable of being paid." There payment in currency was one alternative; payment in coin or bullion was another. On this point this Court said (l. c. 337):

policy of the United States in reference to obligations then outstanding and those thereafter incurred. By words of inclusive character Congress undertook to deal with **any** obligation payable in money of the United States and to provide for the discharge of **every** obligation payable in money of the United States. It is inadmissible to limit the application of the Joint Resolution to obligations payable in money of the United States only. The very reason for the Joint Resolution was to deal with obligations payable in a specified amount of money of the United States which also contained provisions attempting to confer additional rights upon obligees. By the attempted exercise of the option for payment in foreign moneys after June 5, 1933, the holders of the bonds cannot avoid the fact that on June 5, 1933, the Joint Resolution applied to the bonds as obligations payable in money of the United States, and consequently directed the method of their discharge.

The option contained in the bonds became inoperative on June 5, 1933, which was the effective date of the Joint Resolution, and the purported election (whether or not the petitioner, as trustee, had the power to make an election) on a date subsequent to June 5, 1933, was and is wholly ineffective and without any force or effect (R. 142). The bonds on June 5, 1933, were payable in money of the United States and the Joint Resolution on that date directed that all obligations then so payable should be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts. This declaration of the public policy of the United States may not be avoided or defeated by a subsequent purported election to receive payment in a currency other than money of the United States.

It is submitted that this Court will not be disposed to interpret the Joint Resolution to defeat its application to a contract of this kind which would differ only verbally

from the more conventional gold clause. We believe that the true construction is that any contract which gives the creditor an unqualified right to receive money of the United States is within the scope of the Joint Resolution. This accords with the conclusion of the New York Appellate Division in **City Bank Farmers Trust Co. v. Bethlehem Steel Co.**, 244 App. Div. 634, 280 N. Y. Supp. 494, 496, which was that:

“The bonds and coupons which were issued by the appellant are obligations payable in money of the United States. While they provide for payment in sterling or guilders, they are, nevertheless, within the spirit and intent of the joint resolution.”

It cannot be assumed, as petitioner assumes, that Congress deliberately refrained from mentioning foreign currency options in its legislation for the reason that they are a matter of “no particular consequence” (Brief, page 59), an argument in which it still persists in the face of the conclusive answer thereto by this Court in the passage from **Holyoke Water Power Co. v. Paper Co.**, quoted *infra*. In the first place, we say that **the Joint Resolution does reach these bonds**. As stated by the District Court, the Joint Resolution deals with obligations payable in a specified amount of money of the United States which also contain provisions attempting to confer additional rights upon obligees, and the application of the Joint Resolution is not limited to obligations which can be paid only in money of the United States.

In addition, it must be recognized that **the multiple currency options have the same effect as the gold clauses**. There was as much reason to cover obligations containing such options (if they were payable also in United States money) as there was to cover gold clause obligations. Why, we ask, would Congress pass over this class of obli-

gations as a matter of "no particular consequence," when the effect of payment in certain foreign moneys would be the same as that of payment under the gold clause?

Petitioner states that the Joint Resolution should be strictly construed and not in a manner raising doubts as to its constitutionality. This Court has upheld the constitutionality of the Resolution in the **Norman** case. In the **Holyoke** case this Court has said how the Resolution is to be construed. "We must consider the situation of the parties, their business needs and expectations, in gauging their intention," said the Court. We must consider "the evil to be remedied." That evil was correctly described by the Circuit Court of Appeals in the opinion below in the case at bar, when it said:

"In short, the evil struck at by the Resolution was contract provisions purporting 'to give the obligee a right to require payment in gold or a particular kind of coin or currency of the United States; or in an amount in money of the United States measured thereby'—as defined in paragraph (b), 'payable in money of the United States.' The reason why this is an evil and the reason for preventing it being to prevent obstruction of the maintenance of the equal value of the various United States moneys 'in the markets and in the payment of debts.' "

Petitioner argues that the preamble of the Joint Resolution restricts the general language of the enacting part of the statute. The preamble to legislation may be consulted to explain ambiguous terms in the statute, but not to control a clear direction of the enacting part of the statute. **Yazoo v. Thomas**, 132 U. S. 174, 188. It is not admissible to ignore the second sentence of the Joint Resolution because the contents thereof are not recited in the preamble to the Joint Resolution. However, we do not agree with petitioner that the preamble does not touch our case. The

petitioner is in fact seeking to recover an amount of United States money measured indirectly by United States gold coin of the standard of weight and fineness existing in 1912. The preamble recites that the existing emergency had disclosed that provisions of obligations purporting to give the obligee the right to require payment in an amount of money of the United States measured by United States gold coin obstructed the power of Congress to regulate the value of the money of the United States. In our case the 2,490 guilders called for by the guilder option were specified in the indenture as the equivalent of \$1,000 in United States gold coin, and the petitioner is seeking through the enforcement of the foreign money option to assert a claim in an amount of money of the United States measured by the equivalent of United States gold coin of 1912. Naturally, the preamble did not attempt to specify how the evils recited were to be met, but that was left to the enacting part of the statute. The first sentence of the enacting part of the statute proscribed certain specified types of provisions. The second sentence thereof directed the discharge of **all obligations** payable in money of the United States, whether or not provisions of the particular proscribed type were included therein. By this sentence in the enacting part of the statute Congress reached cases where the mischief recited in the preamble was accomplished indirectly rather than directly. As indicated by the Circuit Court of Appeals in its opinion below, the preamble clearly contemplates the striking down of foreign money option clauses when they operate to preserve to the creditor the equivalent of United States gold coin (R. 251).

Petitioner makes the criticism that under the interpretation of the Joint Resolution adopted by the courts below the Joint Resolution would direct the discharge of all kinds of extraneous promises which might be inserted in a bond or note. This is not a just criticism. Under the

“Payment in currency, quite as much as payment in coin or in bullion, was not only performance under the law, but performance under the contract, provided only that the value of the currency was equal, when paid, to the value of the gold.”

In the instant case (assuming, for the purpose of this argument, that the primary obligation was not one for payment in United States money, but that such money was only one equal alternative medium of payment) we find provision for payment under a currency option clause. Substituting words to fit this case for those used by this Court in the above quotation:

“Payment in dollars, quite as much as payment in guilders, was not only performance under the law, but performance under the contract”

The fact that in the **Holyoke** case the option was in the obligor instead of in the obligee, as here, does not alter this situation, for if “payable” means “to be paid” in one case, it means “to be paid” in the other. By implication this Court has defined “payable” to mean “capable of being paid” in the **Holyoke** case. It can have no different meaning as applied to the option clause of the First Terminal and Unifying Bonds.

“Payable,” as used in the Joint Resolution, and as applied to the option clause in these bonds, must mean “capable of being paid.” It has been so construed by this Court in an analogous situation. The cases holding that it means “which must be paid” or “to be paid” do not have to do with cases involving an optional medium of payment and cannot, therefore, be regarded as authority in a case involving such an option. The argument that “payable,” as used here, means obligatory payment in all events goes too far, for, under this view, if the option for some reason cannot be exercised, the bonds containing the option clause would never be payable. The Circuit Court

of Appeals in its opinion below found that the word "payable" is, standing alone, ambiguous, and that it could mean "must be paid" or could mean "capable of being paid" (R. 249). It therefore looked to the Joint Resolution as a whole, including the preamble, and to the evil to be remedied, to determine in what sense the word "payable" was used in the Joint Resolution. It concluded, for the reasons which it expressed in its opinion, that in the Joint Resolution the word "payable" means "capable of being paid."

The cases and Harvard Law Review article cited by petitioner do not apply to these bonds, especially in view of the language of this Court in the **Holyoke** case: "The obligation was one for the payment of money. . . . Weasel words will not avail to defeat the triumph of intention when once the words are read in the setting of the whole transaction." Here the intention is clear; **weasel words will not avail to defeat it.**

3. Every Obligation Payable in Money of the United States Is to Be Discharged Upon Payment, Dollar for Dollar, in Current Legal Tender, Irrespective of the Other Provisions Contained Therein, and the Joint Resolution May Not Be Confined to the Invalidity Alone of the Conventional Gold Clause.

The Joint Resolution applies to every obligation which was payable in money of the United States on the date of the passage of the Resolution. A bond payable in money of the United States, containing an option for alternative payment in gold or foreign money, is payable in money of the United States. On June 5, 1933, the effective date of the Joint Resolution, the options for payment in other than United States money had not been exercised; and the bonds come literally within the description of obligations reached by the statute. The Joint Resolution declared the public

lower courts' conclusions, any money contract which was capable of being discharged in United States gold coin or prescribed equivalents thereof might be discharged in United States legal tender. Extraneous promises upon an independent consideration would not be affected.

Petitioner gives us the basis for its restricted view of the Joint Resolution when it says (Brief, page 57) that the Joint Resolution was brought into being solely because of the shortage of gold. As a preliminary to the discussion of the interpretation of the Joint Resolution, *supra*, it has been shown that Congress was alive to the necessity of reducing the value of the dollar so as to raise prices generally, and particularly to increase the values of foreign moneys.

It is argued that the Joint Resolution could not be given extraterritorial effect and that the place of performance in respect to the payment of guilders is not within the United States. But the domicile of the Debtor and the property securing the bonds are within the United States, the bonds were issued and sold in this country, the petitioner is an American corporation, this claim is presented on behalf of American owners, and recourse is made to an American court for the allowance of the claim. The Joint Resolution is by its terms a declaration of public policy. The presumption against extraterritorial construction of a statute does not preclude a state or country from enforcing its rule of public policy where resort is had to its courts to enforce the obligations of its citizens. **Union Trust Co. v. Grosman**, 245 U. S. 412, 416; **Oceanic Steam Navigation Co. v. Corcoran**, 9 F. (2d) 724, 731 (C. C. A. 2, 1925).

We cannot improve upon the reasoning of the Circuit Court of Appeals in the opinion below concerning the impropriety of applying foreign law in order to defeat the declared public policy of this country. That court said (R. 253):

“ * * * the holder is secured from depreciation of the gold dollar not only by a gold clause provision, but by a fourfold further assurance in these foreign currencies of values based on the specified gold dollar. Thus by running around an international stamp—passing through Holland en route—the holder of every bond and coupon enriches himself substantially at the expense of the debtor and of other creditors. Here, the same result (with further saving of exchange charges) is reached merely through a formal demand in Holland for payment (known to be futile) and by a simple mathematical calculation. Also, this in a situation where no payment is possible, but where the above advantage will increase the indebtedness of the debtor, and, therethrough, the participation of these holders in the property reorganization at the expense of every other person financially interested in that property.

“Such a result would be squarely within a situation similar to that expressed by the Chief Justice in outlining the effect of devaluation of the dollar (Norman v. B. & O. R. Co., 294 U. S. 240, 315). Clearly, such result so reached would interfere with the purpose of the Joint Resolution (expressed in its title) ‘To assure uniform value to the coins and currencies of the United States’ which was to be accomplished through enforcement of ‘the declared policy of the Congress to maintain at all times the equal power of every dollar, coined or issued by the United States, in the markets and in the payment of debts’ by striking down all private obligations requiring payment in a particular kind of coin or currency. In short, the evil sought to be avoided by the Resolution is accomplished by a form of indirection and, to that extent, the purposes of the Resolution and, therefore, the Resolution itself defeated. We think such a result brings these instruments within the intendment of the Resolution and within the ambiguous expressions, set out hereinabove, of the Resolution. The vice of these instruments, in view of the Resolution, is that they provide for payment in gold dollars of a specified

weight and fineness or, optionally with the holders, in foreign currencies, the amount or value of which is based upon that gold dollar."

The New York Court of Appeals had no difficulty in applying the Joint Resolution in a suit brought in a New York court, although between citizens of foreign countries, in **Compania de Inversiones Internacionales v. Industrial Mortgage Bank of Finland**, 269 N. Y. 22, certiorari denied 297 U. S. 705, saying at page 31:

"The Joint Resolution has thus revealed clearly the intention of the Congress to regulate the kind and amount of the currency wherewith the obligation may be discharged, as a matter of public policy in this jurisdiction. The parties to a contract may not by their intention, however expressed, override the laws of the country in which suit is brought when a matter of the public policy of that country is involved. Even comity with the laws of another jurisdiction never extends to the enforcement of a law of that jurisdiction which violates a positive law of the country wherein suit is brought and is contrary to its public policy (American Law Institute, Restatement of Conflict of Laws, p. 440; *De Beeche v. South American Chilean Stores*, etc. [1935], A. C. 148). Consequently it becomes immaterial whether the obligations of these bonds would otherwise be governed by some foreign law."

We submit that in the first sentence of paragraph (a) of the Joint Resolution Congress dealt with particular "provisions" contained in "obligations." But Congress was not content only to strike down particular "provisions." It desired that the effect of the statute should be as broad as its purpose, viz., to deal with "any obligation," "heretofore or hereafter incurred," "whether or not any such provision is contained therein or made with respect thereto." All such obligations were to be dis-

charged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender. A legislative draftsman would be at a loss to suggest language more apt to show the all-inclusive character of the statute's application to **obligations**.

The object sought to be accomplished by Congress in its monetary legislation will be effectuated if the Joint Resolution is given the application for which we contend. The spirit as well as the letter of the statute will be made effective. The objective of Congress will be defeated, as applied to this particular situation, if the Joint Resolution is found not to apply to bonds carrying foreign money option clauses of the kind here involved.

4. A Review of the Authorities Dealing With the Joint Resolution Pertinent to Obligations Containing Foreign Money Options Indicates That the United States Supreme Court Decisions Support the Decision Below, and That the Holdings of Other Courts Are Divided.

Having considered the application of the Joint Resolution to the First Terminal and Unifying Bonds as a matter of principle, we come now to a review of the cases dealing with the issues involved.

(a) Supreme Court Decisions.

1. **Norman v. B. & O. Railroad Co.**, 294 U. S. 240, decided February 18, 1935. This Court in this case sustained the constitutionality of the Joint Resolution. The Court held that gold-clause obligations which purported to require the debtors to pay an increased amount of currency, after the devaluation of the dollar, were such an obstacle to the exercise of the constitutional power of Congress to regulate the value of money that it was competent for Congress to enact the Joint Resolution of June 5, 1933. In the course of the opinion Mr. Chief Justice Hughes pointed

out the dislocation of the domestic economy which would be caused by the disparity which would result from debtor railroads receiving their rates, fares and charges in the depreciated dollar and being compelled under gold clauses to pay \$1.69 in currency for every dollar which they had borrowed.

It may be noted here that this Court in that case (page 302) and subsequent cases (see **Smyth v. United States**, 302 U. S. 329, 361) has concurred in the interpretation of the English House of Lords in **Feist v. Societe Intercommunale Belge d'Electricite**, L. R. (1934) A. C. 172, 173, that the conventional gold clause is to be taken as a "gold value" undertaking to pay in gold dollars of the specified weight and fineness or their equivalent in lawful currency. The importance of this, in this connection, lies in that the Joint Resolution is found to condemn the gold clause in the aspect in which it requires payment of an increased amount of currency as well as in the aspect of requiring actual gold coin.

2. **Holyoke Water Power Co. v. Paper Co.**, 300 U. S. 324, decided March 1, 1937. This case dealt with a lease which provided that the grantee should yield and pay to the grantor as rent "a quantity of gold which shall be equal in amount to fifteen hundred (\$1500) dollars of the gold coin of the United States of the standard of weight and fineness of the year 1894, or the equivalent of this commodity in United States currency." The lessor contended that payment should be made under the lease for as many ounces of gold as were contained in the stipulated gold dollars. The lessee contended that it could discharge the rental by the payment in United States lawful tender of the number of dollars mentioned. This Court held for the lessee on the ground that the contract was "within the letter of the Joint Resolution of June 5, 1933, and equally within its spirit."

This Court in the first numbered paragraph of the opinion determined (page 335):

"The obligation was one for the payment of money, and not for the delivery of gold as upon the sale of a commodity.

"The lessor was a water power company, engaged in that business and not in any other. There is no pretense that it was stipulating for gold to be used in art or industry. What it wished was currency, or bullion susceptible of being converted into currency, the lessee to make the choice. The alternative forms of payment shed light upon each other."

In the second numbered paragraph of the opinion the Court considered the spirit and intent of the Joint Resolution, saying at page 337:

"A contract for the payment of gold as the equivalent of money, and a fortiori a contract for the payment of money measurable in gold, is within the letter of the Joint Resolution of June 5, 1933, and equally within its spirit."

And further on, at page 339, the Court said:

"As definitely, indeed more obviously, the evil includes transactions whereby a debt is to be discharged, not in bullion, but in dollars, if the number of the dollars is to be increased or diminished in proportion to the diminution or the increase of the gold basis of the currency."

Previously, under the first numbered paragraph of the opinion, page 335, it had observed:

"We must consider the situation of the parties, their business needs and expectations, in gauging their intention. When these are kept in view, the gold is seen to be a standard with which to stabilize the value of the dollar; the dollar not a yardstick with which to measure the quantity of the gold. To read the

leases otherwise is to permit the realities of the transaction, its substance and essential purpose, to be obscured by forms and phrases. Long ago it was said by a distinguished member of this court, commenting upon a different statute, but one analogous in purpose: 'If the contract is for the delivery of a chattel or a specific commodity or substance, the law does not apply. If it is bona fide for so many carats of diamonds or so many ounces of gold as bullion, the specific contract must be performed (assuming, of course, that contracts for the delivery of bullion are not prohibited by law). But if terms which naturally import such a contract are used by way of evasion, and money only is intended, the law reaches the case.' Per Bradley, J., in *The Legal Tender Cases*, 12 Wall. 457, 566. **Here what was intended was to assure the payment of a money debt in dollars of a value as constant as that of gold.** *Norman v. Baltimore & Ohio R. R. Co.*, supra, p. 302; cf. *Feist v. Societe Intercommunale Belge D'Electricite* (1934), A. C. 161, 172, 173. The fact is of little moment that currency is characterized as a commodity in the verbiage of the covenant as long as it is currency. Cf. *Lipke v. Lederer*, 259 U. S. 557, 561, 562. Weasel words will not avail to defeat the triumph of intention when once the words are read in the setting of the whole transaction. So read, the end to be achieved is shown forth unmistakably as a payment, not a sale."

In the third numbered paragraph of the opinion, pages 339 and 340, this Court found the conclusion to follow that the obligation under consideration should be discharged, dollar for dollar, in United States legal tender, saying: "'Dollar for dollar,' the obligation for the payment of money conforming to the standard of the covenant is to be discharged with money of the standard established by the law."

In the fourth numbered paragraph of the decision this

Court answered a contention to the effect that Congress lacked the constitutional power to deal with contracts, which, because of their smallness in number, did not seriously affect its power to regulate money, saying at page 341:

“No principle of constitutional law, no dictate of fair dealing, lays a duty upon the Congress to single out for special treatment an individual or a few among the members of a common mass. Cf. *Purity Extract Co. v. Lynch*, 226 U. S. 192, 201. One cannot even say with reason that the effects of this particular covenant are to be classified as negligible. The lessee as the recipient of principal or income must accept payment from its debtors in the depreciated currency. It is injured, at least appreciably, if it is required to pay its creditors in dollars of a different standard. *Norman v. Baltimore & Ohio R. Co.*, supra, p. 315. Receipts and disbursements are no longer on a common basis.”

The passages quoted from this recent decision of this Court are applicable to this case. In considering the circumstances surrounding the issuance and sale of these bonds to Americans (R. 160), we do not find a sale or purchase of foreign money. A domestic holder did not purchase the bonds with guilders, and he was concerned with the repayment of principal loaned in United States money and with the earning of interest thereon. It is also true in this case that the claim sought to be established by the petitioner is in a number of United States dollars, increased in proportion to the diminution of the gold basis of the United States currency.

The paramount importance of the **Holyoke** case as a precedent in the instant case lies in its holding that an obligation, dischargeable in one alternative in gold bullion (a promise which standing alone is not affected by the Joint Resolution), is brought within the Joint Resolution because

money option provisions contained in such obligation. Interest coupons of the Bethlehem Steel Company provided for payment in United States gold coin, or, in the alternative at the holder's option, in Dutch guilders. Action was brought by a domestic holder for the value of the guilders specified in the coupons. The court did not allow recovery of the dollar equivalent of the guilders. It held, relative to such obligations, that "The bonds and coupons which were issued by appellant (Bethlehem Steel Company) are obligations payable in money of the United States," and it pointed out that where domestic holders of bonds and coupons were concerned they were also "within the spirit and intent of the joint resolution," saying:

"It is not contended by the appellant that the holders of these coupons, who are subjects of England and Holland, respectively, are governed by the terms of the joint resolution. In fact, the affidavits show that all payments have been made to bona fide holders in foreign countries in accordance with the terms of the agreement. It is claimed, however, and rightfully so, that the citizens of our country are controlled by the terms of the joint resolution, particularly where, as here, the bonds were purchased in the United States by citizens thereof, and the parties who purchased them expected to be paid in dollars, the value of which was not to be governed by the currency of any other country. It would be exceedingly unjust to compel the appellant to meet its obligations on the basis of the old standard, when the entire income from its business is received in the existing currency."

From these premises the conclusion followed that the coupons were to be discharged in United States legal tender, dollar for dollar, as provided by the second sentence of Section 1 (a) of the Joint Resolution, the court remarking:

"That portion of the joint resolution which is par-

ticularly applicable to this case reads as follows: 'Every obligation, heretofore or hereafter incurred, whether or not any such provision is contained therein or made with respect thereto, shall be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts.' "

2. **Anglo-Continentale Treuhand, A. G., v. Southern Pacific Company**, by the Appellate Division, First Department, of the Supreme Court of the State of New York (June 12, 1937), 251 App. Div. 803, 298 N. Y. Supp. 181, unanimously affirming, without opinion, decision of the New York Supreme Court for New York County, by Mr. Justice Valente, 165 Misc. 562, 299 N. Y. Supp. 859. This action was brought by an European corporation for the guilder value of coupons payable in United States gold coin, or, at the holder's option, in guilders. The court sustained the sufficiency of an answer based upon the Joint Resolution which alleged that the domestic owner of the bonds had transferred the coupons containing the guilder option to the foreign corporation for the purpose of evading the Joint Resolution, and that consequently the coupons should be discharged, dollar for dollar, in United States currency.

3. **Zurich General Accident & Liability Insurance Co., Lim., v. Lackawanna Steel Co. et al.**, a decision in the New York Supreme Court for the County of New York by Mr. Justice Rosenman, 164 Misc. 498, 299 N. Y. Supp. 862, affirmed sub. nom. **Zurich General Accident & Liability Insurance Co., Lim. v. Bethlehem Steel Co.**, 254 App. Div. 839, 6 N. Y. Supp. (2d) 139, reversed, New York Court of Appeals, January 11, 1939. In an action for the Swiss franc value of coupons payable in United States gold coin, or, at the option of the holder, in Swiss francs, by foreigners who acquired their bonds after the adoption of the

case the plaintiff, a corporation of the Principality of Liechtenstein, in Europe, owned thirty-six of the First Terminal and Unifying Bonds herein concerned. After presenting the coupons appurtenant to these bonds in Amsterdam on their maturity date and not receiving payment thereof in guilders, it brought suit to recover the value of the guilders called for by the coupons. Upon the pleadings and affidavits, summary judgment in favor of the plaintiff was directed, in accordance with the New York practice, for the guilder value, and this was affirmed by the Circuit Court of Appeals for the Second Circuit, and certiorari was denied by this Court. The case is a holding by the Second Circuit that a foreign holder of bonds and coupons, no matter when acquired, may recover judgment in American courts for the value of foreign moneys called for by foreign money options contained in the coupons. The opinion makes clear, however, that the court did not regard the nationality of the owner of the bonds as important.

A careful study reveals that the Second Circuit Court of Appeals based its conclusion that the Joint Resolution did not apply upon two principal premises.* The first premise

*Unfortunately for the clarity of the opinion the court, by some inadvertence, misstated the question for decision in the third sentence from the end of the first paragraph of the opinion. It stated: "The only question is whether the damages recoverable in dollars in this action are to be calculated at the gold par of the guilder, or at the rate of exchange prevailing in New York at the time of judgment." In fact there was only a slight variance between the gold par of exchange in the years 1934 to 1936, i. e., \$.680567 (R. 168), and the exchange value of the guilder then current. Any substantial variation would have been corrected by the shipment of gold. This inadvertence led to the absurd summary of the decision in the syllabus to the effect that the court held that damages should be recoverable calculated at the gold par of the guilder and not at the prevailing rate of exchange in New York. Of course, it is elementary that the value of foreign moneys is determined at the exchange rate at the date which is deemed important by the Court, and never at its nominal par. 48 C. J. 606; *Sutherland v. Mayer*, 271 U. S. 272, 295. This error has been carried forward by the New York court of Appeals in its opinions of January 11, 1939, where it said "That Court decided that damages recoverable in dollars were required to be calculated at gold par of the guilder and not at the rate of exchange prevailing in New York at the time of the judgment."

was that the effect of the Joint Resolution was limited to a proscribing of the provisions mentioned in the first sentence of the enacting clause thereof. This is implicit from the following statement of the court in the second paragraph of the opinion:

“still it is a plausible, though to us not a persuasive, argument that ‘obligation’ means the instrument itself and that the resolution therefore covers all instruments which contain a promise to pay money of the United States. That would put these bonds within the resolution as to the promise to pay dollars in gold, as of course they are, but it does not advance the defendant’s case a whit as to the other promises. They are within the resolution only in case its terms cover them, which they do not. It only proscribes a ‘provision’ which ‘purports to give the obligee a right to require payment in gold or a particular kind of coin or currency, or in an amount in money of the United States measured’ by either. Since, as we have seen, the promise to pay guilders did not ‘purport * * * to require payment in gold,’ the resolution does not hit it.”

With this language the court concluded its statement of the reasons why the language of the Joint Resolution did not hit the coupons in question. The opinion can be searched and no reference can be found to the second sentence of the enacting clause of the Joint Resolution. The court failed to perceive that if it had yielded to what it termed the plausible but not persuasive argument that “obligation” included the coupon as such, such coupon became dischargeable, dollar for dollar, in United States legal tender by reason of the express command of the second sentence of the Joint Resolution.

The second premise of the opinion was that the application of the Joint Resolution should be determined by consideration solely of the written face of the contract, and

of the other alternative for payment of money, and because under the circumstances the obligation was plainly a money contract.

Petitioner urged below that the **Holyoke** case is to be distinguished from the instant case because in the **Holyoke** case the option was in the promisor, whereas in this case it is in the promisee. To us the case for an obligation being payable in money of the United States, so as to be reached by the Joint Resolution, is much stronger when the option is in the promisee. In such situation the obligee has a legally enforceable right to require United States money in payment. The Joint Resolution is directed to situations where a creditor has provided by contract for protection from the debtor against a reduction in the value of the dollar and ordinarily such protection will be secured through giving the option to the promisee in the case of an alternative contract.

This Court in the **Holyoke** case viewed the fact that the option was in the promisor to deliver gold, or the value of gold in money, as evidence showing that the promisee was not desirous of gold as a commodity. In the instant case we have other circumstances showing that the bondholders were not desirous of receiving guilders as such, but instead sought to be assured that the dollars which they would ultimately secure as a result of performance by the Debtor would have a value as great as the gold coin dollars mentioned in the bond contract.

(b) **Decisions of New York State Courts.**

The New York Court of Appeals on January 11, 1939, decided the appeals in the cases of **Zurich General Accident & Liability Insurance Co., Lim., v. Bethlehem Steel Co.**, 254 App. Div. 839, 6 N. Y. Supp. (2d) 139, and **Anglo-Continental Treuhand, A. G. v. Bethlehem Steel Co.**, 254

App. Div. 844, 6 N. Y. Supp. (2d) 334, presenting the question as to the application of the Joint Resolution to coupons payable in money of the United States and also payable, at the option of the holder, in specified foreign moneys, and owned by foreigners. The Court of Appeals, by a five-to-two decision, decided that the Joint Resolution did not apply to the foreign money options there involved under the facts of those cases.

In the short opinions in these cases the New York Court of Appeals merely announced its conclusions based upon the facts before it in those cases.

The rationale of that court's decisions is not disclosed by the opinions, but the repetition in each opinion that the decision was "on the facts of this case," the failure to overrule expressly the Appellate Division decision in **City Bank Farmers Trust Company v. Bethlehem Steel Company**, 244 App. Div. 634, 280 N. Y. Supp. 494, where domestic coupon holders were involved, and the omission of any statement of dissent from the decision below in the case at bar, justify the conclusion that the decisions were confined to the facts of the particular cases. Because these cases are to be argued before this Court after the instant case, we refrain from an extended discussion of the opinions of the New York Court of Appeals.

At this time we review the decisions of the New York Supreme Court and New York Appellate Division, First Department, which were in general accord with the contentions of the respondents in respect to the application of the Joint Resolution to bonds of this character.

1. **City Bank Farmers Trust Co. v. Bethlehem Steel Co.**, 244 App. Div. 634, 280 N. Y. Supp. 494, decided May 31, 1935. In this case there was squarely presented the right of an American citizen to recover judgment for an amount in excess of the United States money face of an obligation payable in money of the United States because of foreign

Joint Resolution, the Supreme Court in New York sustained a defense based upon the Joint Resolution. The reasoning of Mr. Justice Rosenman is strikingly parallel to that of Mr. Justice Cardozo in the **Holyoke** case, supra. In this case, which is one of the most fully reasoned expressions upon this subject, Justice Rosenman said:

“An analysis of the Joint Resolution will disclose that it relates to two independent subjects, both of which may or may not be included in any one particular instrument.

“It relates to every ‘**obligation**’ payable in money of the United States. It relates also to ‘**provisions**’ in **any** obligation which give the obligee a right to demand payment in gold.

“With respect to such ‘obligations,’ it provides that they shall be payable, dollar for dollar, in any legal tender. With respect to such ‘provisions,’ it provides that every one of them, past, present or future shall be void as against public policy. And it further provides that every obligation is payable, dollar for dollar, in legal tender, even though there be not included in the obligation such a provision to pay in gold. • • •

“The Joint Resolution, not stopping with the phrase which outlaws the provisions in obligations calling for payment in gold, proceeds to make payment of legal tender sufficient for **all** obligations payable in money of the United States, whether they contain such a provision for gold payment or not. This latter provision, applicable to all such obligations, was not necessary if the Joint Resolution were only intended by the Congress to cover United States coin or currency, since the separate gold clause provision in the resolution took care of the question of United States coin and currency even if gold payments were promised. It must have been intended by the Congress to cover not only situations where gold had been promised, but also all cases where a promise has been made, like the present one, which would have required payment in some other manner than dollar for dollar on a parity

with other obligations. An alternative currency provision is one of the contingencies at which the Joint Resolution was aimed."

The Appellate Division affirmed Justice Rosenman's decision, two justices dissenting. As stated *supra*, this case was reversed by the New York Court of Appeals.

4. **Anglo-Continentale Treuhand, A. G., et al. v. Bethlehem Steel Co.**, 254 App. Div. 844, 6 N. Y. Supp. (2d) 334, modifying decision below, 98 New York Law Journal 1164, October 15, 1937, reversed, New York Court of Appeals, January 11, 1939. This case was decided by the Appellate Division at the same time as it decided the **Zurich General Accident & Liability Insurance Co.** case, *supra*, and this decision was to the same effect, and it has been reversed by the New York Court of Appeals.

(c) **Decisions of Lower Federal Courts.**

1. **McAdoo v. Southern Pacific Company**, 10 F. Supp. 953, decided June 17, 1935, reversed 82 F. (2d) 121. There the district court reached the conclusion that a domestic holder of an interest coupon which provided for payment in United States gold coin, or, at the holder's option, in several foreign moneys, could recover the value of the foreign money. This decision was reversed by the Circuit Court of Appeals for the Ninth Circuit on jurisdictional grounds. The district court's conclusion was founded upon the premise that the Joint Resolution was directed solely against the conventional gold clause, saying, at page 954:

"Congress was dealing with contracts calling for payment in gold coin of the United States; not with contracts payable in money of foreign countries."

2. **Anglo-Continentale Treuhand, A. G., v. St. Louis Southwestern Railway Company**, 81 F. (2d) 11 (C. C. A. 2), January 13, 1936, certiorari denied 298 U. S. 655. In this

that the court should not consider the circumstances surrounding the making of the contract to determine whether it was in fact a money contract, as, for instance, an agreement from an American debtor to an American creditor to repay American money loaned for use in America, or a commodity or foreign money contract, as, for instance, an agreement given to a foreign creditor to evidence a transaction in or concerning guilders. This premise the court emphasized in the next to the last paragraph of its opinion, as follows:

“If the resolution did not reach bonds held by aliens when passed, it did not reach those then held by citizens; we cannot give the same words one meaning for one set of obligees and another for another. Congress either forbade the enforcement of such promises, or it did not. We will not try to recast it altogether, excepting alien obligees though its language covers them equally with citizens.”

In that opinion it is said of the Joint Resolution, “It only proscribes a ‘provision’ which ‘purports to give the obligee a right to require payment in gold or a particular kind of coin or currency, or in an amount in money of the United States measured’ by either.” But the Joint Resolution does more than this. It proscribes the provisions mentioned, but furthermore it directs that any obligation payable in money of the United States, whether or not the proscribed provisions are contained therein, is to be discharged upon payment; dollar for dollar, in United States legal tender.

This Court in **Holyoke Water Power Co. v. Paper Co.**, supra, swept away previous misconceptions, including the premises advanced by the Circuit Court of Appeals for the Second Circuit in support of its decision in **Anglo-Continentale Treuhand, A. G. v. St. Louis Southwestern Railway Company**.

It did not ignore the second sentence of the Joint Resolution, as did the Second Circuit, but to the contrary found that the obligation being considered by it was one to be discharged under the command of the second sentence, dollar for dollar, in legal tender. It said at page 335:

“The obligation was one for the payment of money, and not for the delivery of gold as upon the sale of a commodity,”

and again, on page 339:

“Accordingly, all such provisions* are declared to be against public policy, and every obligation, heretofore or hereafter incurred, though it contain such provisions, shall be payable, dollar for dollar, in legal tender at the time of payment”;

and on page 340:

“‘Dollar for dollar,’ the obligation for the payment of money conforming to the standard of the covenant is to be discharged with money of the standard established by the law.”

It is equally clear that the second premise of the Second Circuit Court of Appeals’ decision that the application of the Joint Resolution may not vary with the circumstances surrounding the execution of a contract was expressly repudiated by this Court in the **Holyoke** case, where, in considering the contract there concerned, it observed, on page 335 of its opinion, that the lessor was a water power company engaged in that business and not in any other, and that there was no pretense that it was stipulating for gold to be used in art or industry, but that which it wished was currency or bullion susceptible of being converted into currency, and said:

“We must consider the situation of the parties,

*Those mentioned in the first sentence of the Joint Resolution.

their business needs and expectations, in gauging their intention."

After this emphasis by this Court upon the duty to consider all surrounding circumstances in determining whether a contract is the kind of obligation which comes within the provisions of the Joint Resolution, it would be idle for anyone to refer to **Anglo-Continentale Treuhand, A. G. v. St. Louis Southwestern Railway Company** to support the proposition that varying circumstances may never determine whether an obligation is a money contract within the terms of the Joint Resolution or solely a commodity contract outside of its reach.

The Circuit Court of Appeals for the Eighth Circuit in its decision below perceived the irreconcilability of the views expressed by the Circuit Court of Appeals for the Second Circuit in the **Anglo-Continentale Treuhand** case with the guides given by the Supreme Court in the **Holyoke** case (R. 249).^{*} It then proceeded to a determination of whether under the circumstances in the record before it the First Terminal and Unifying Bonds of the St. Louis Southwestern Railway Company were obligations payable in money of the United States, money contracts, dischargeable, dollar for dollar, in United States legal tender, or commodity contracts outside of the reach of the Joint Resolution. In determining this question it conducted an

^{*}It said: "Both the **Anglo-Continentale Treuhand** and the **McAdoo** opinions reveal the same reasoning in reaching a decision. That reasoning is that the language of the resolution is clear and unambiguous and means obligations which **must** be paid in United States gold dollars or the equivalent thereof in other United States money." That is indeed the effect of those decisions which find in the Joint Resolution only a proscription of any individual promise requiring payment of gold or a particular kind of coin or currency or an amount in money of the United States measured thereby. Thus, to come within the reach of the Joint Resolution, as so limited, there must be a promise which combines an agreement to pay in gold and an agreement to pay in United States money, which is, we take it, the peculiar feature of the conventional agreement to pay in United States gold coin. With the disappearance of United States gold coin from circulation it is not likely that the gold coin contract will again become popular. The Joint Resolution, if so interpreted, would have a very limited application in the future.

inquiry which had not been conducted by the Second Circuit Court of Appeals because that court had thought, upon grounds now untenable, that an inquiry of such a nature was pointless.

For the foregoing reasons, we contend that the decision of the Circuit Court of Appeals for the Second Circuit in the **Anglo-Continentale Treuhand** case was clearly wrong. Even if this were not true, however, there is no necessary inconsistency between the holding of the Second Circuit Court of Appeals, dealing with the rights of foreign holders of bonds to collect the interest in guilders, and the holdings of the courts below, dealing with the rights of domestic holders of such bonds. There are some expressions in the opinion of the Second Circuit Court of Appeals indicating that it would have reached a different conclusion than did the courts below in respect to the rights of domestic holders of such bonds. Since those expressions went beyond the point for decision they are dicta. As pointed out above, such expressions are not in accord with the criteria for the application of the Joint Resolution adopted by this Court in **Holyoke Water Power Co. v. Paper Co.**, supra. The Second Circuit Court of Appeals said in its opinion in the **Anglo-Continentale Treuhand** case, at page 13:.

“If the resolution did not reach bonds held by aliens when passed, it did not reach those then held by citizens; we cannot give the same words one meaning for one set of obligees and another for another. Congress either forbade the enforcement of such promises, or it did not. We will not try to recast it altogether, excepting alien obligees though its language covers them equally with citizens.”

But Mr. Justice Cardozo, for this Court, 300 U. S. 324, 335, pointed out that the important consideration was whether the contract was a money contract within the reach of the

Joint Resolution or a commodity contract without the scope of such legislation, and to that end "We must consider the situation of the parties, their business needs and expectations, in gauging their intention," and he observed that in the case before the Court the contract did not represent the sale of gold and that the promisee was not desirous of receiving gold and did not have use therefor—"Weasel words will not avail to defeat the triumph of intention when once the words are read in the setting of the whole transaction."

It is submitted that where the bonds are issued in this country and are owned by United States citizens who paid dollars therefor, they represent a United States money contract—not a purchase of guilders—and are within the scope of the Joint Resolution of Congress dealing with United States money contracts. **The difficulty with the DICTA in the opinion of the Second Circuit Court of Appeals is that it ignores the circumstances of the parties and their intentions and expectations in respect to the payment of the bonds.**

3. **Emery-Bird-Thayer Dry Goods Co. v. Williams**, 15 F. Supp. 938. This case involves a lease calling for payment of rent in a stated number of grains of gold of a specific weight and quality, or, in the alternative at the lessor's option, in United States money of a specified amount. The lessee filed a petition for an injunction restraining the lessor from declaring a forfeiture of the lease because of the failure of the lessee to pay the rent in gold after June 5, 1933. The district court, in Missouri decided the case in favor of the lessor. An appeal from the decision of the district court in this case is now pending in the Circuit Court of Appeals for the Eighth Circuit. An opinion of that court in 98 F. (2d) 166; rendered July 13, 1938, on the same day the decision below was handed down, was not regarded by the judges joining in the majority opinion

therein as conflicting with the decision below in this case. A petition for rehearing has been granted, the decree has been set aside, and the case was reargued on December 12, 1938. The Circuit Court of Appeals has not finished its consideration of that case, and any reliance on the language of that court in the decision on the first presentation of the case is premature. Even if the Eighth Circuit Court of Appeals should reaffirm the conclusions expressed in its first opinion in that case, in our judgment there is no necessary conflict between that case and the decision in the case at bar. Unquestionably in the **Emery-Bird-Thayer** case the option to receive United States money was secondary to a primary promise to deliver gold as a commodity, whereas in the instant case the ~~promise to pay~~ United States gold coin was either primary, as found by the courts below, or of equal rank with the other promises in the bonds, as contended for by petitioner.

(d) **Periodicals.**

Petitioner stresses particularly articles by Professor Nussbaum. The article bearing upon the question under consideration appears in 84 University of Pennsylvania Law Review 569. It is true that he states his disagreement with decisions applying the Joint Resolution to bonds payable in United States gold coin, or, optionally, in foreign moneys. However, he found it difficult to face the logical consequences of his position, and inconsistently suggests that the Joint Resolution should be held to apply to bonds of this character made in the future, although not applicable to such bonds issued before the adoption of the Joint Resolution—a distinction not possible under the language of the Joint Resolution and not consistent with the purposes prompting its adoption. Professor Nussbaum's comments in this regard, pages 582 and 583, are as follows:

“Although the doctrine advanced in the Bethlehem

Steel case does not stand analysis, there may be a repercussion of the Joint Resolution on the multiple currency matter. The Resolution not only abolishes gold obligations existing at the time of its enactment, but it forbids entering into such obligations in the future. Suppose Americans, under the rule of the Resolution, make a contract payable in a foreign currency generally considered at the time of contracting to be more stable than the dollar. Such conduct may be perfectly justifiable, for instance, where an American importer resells imported goods to an American wholesaler, thus trying to unload or distribute the risk as to the varying rates of exchange which he has taken in the ordinary course of his business. But where no such justification appears, suspicion and even an adverse presumption possibly will arise to the effect that nothing else is sought by the agreement than to secure, to the creditor, a guarantee virtually replacing a gold clause. Although the language of the Joint Resolution does not cover this case, application of the Federal Act might be possible under an evasion doctrine."

Prior to 1933 the owners of the bonds here involved had no occasion to exercise the options for foreign money payment. Such options could not have enhanced the value of the bonds in their hands, since the financial community regarded the gold clauses contained in these bonds as adequate protection against depreciation of United States money. Under these circumstances, for an American holder to exercise the previously unused options for foreign money payment in order to create a basis for an action to recover more American dollars than his bond or coupon called for is as much an evasion of the Joint Resolution as would be the issuance at this time of new bonds containing foreign money options.

A note in 35 Columbia Law Review 1132 endorses respondents' position.

5. **The First Terminal and Unifying Bonds Involved Here Are Primarily United States Money Obligations, Dischargeable as Directed by the Joint Resolution, and the Foreign Moneys Mentioned in the Foreign Money Options Were Intended as Equivalents of the United States Gold Coin Called for by the Bonds and Coupons.**

Many of the decisions of the state and lower federal courts which have dealt with the point for decision have considered the application of the Joint Resolution to the coupons as disclosed upon the face of the obligations in suit. The Second Circuit Court of Appeals, in, **Anglo-Continentale Treuhander, A. G., v. St. Louis Southwestern Railway Co.**, supra, assumed the promises to pay United States gold coin or the various foreign moneys, contained in the St. Louis Southwestern Railway Company coupons, to be co-ordinate obligations and equal alternatives (see the first sentence of the second paragraph of the opinion, 81 Fed. [2d] 11), and the court was careful to confine its decision to the language of the coupons before it, and said at page 12 of the opinion:

“It is not necessary for us to decide that the joint resolution does not cover any conceivable promises to pay foreign currencies. Perhaps it may.”

This Court in **Holyoke Water Power Co. v. Paper Co.**, supra (decided after the Second Circuit decision), directs another approach. This Court there weighed the circumstances surrounding the making of the contract to see if the contract was a money contract (dischargeable, dollar for dollar, in currency under the Joint Resolution) or a commodity contract (outside the Joint Resolution); the Court, in the light of the circumstances, determined that it was essentially a money contract, despite the alternative for performance by delivery of bullion, and thus it was

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within the Joint Resolution. The Court noted at 300 U. S. 335:

"The lessor was a water power company, engaged in that business and not in any other. There is no pretense that it was stipulating for gold to be used in art or industry. What it wished was currency, or bullion susceptible of being converted into currency, the lessee to make the choice. The alternative forms of payment shed light upon each other."

And it commented:

"We must consider the situation of the parties, their business needs and expectations, in gauging their intention."

In addition, this Court prescribed a method of solving the problem when it said that the evil intended to be prevented by the Joint Resolution must be considered. In using the guide so prescribed, the Eighth Circuit Court of Appeals, in the opinion below, said:

"In short, the evil struck at by the Resolution was contract provisions purporting 'to give the obligee a right to require payment in gold or a particular kind of coin or currency of the United States, or in an amount in money of the United States measured thereby'—as defined in paragraph (b), 'payable in money of the United States.' The reason why this is an evil and the reason for preventing it being to prevent obstruction of the maintenance of the equal value of the various United States monies 'in the markets and in the payment of debts.'"

"With the evil and the reason for prevention in mind," the Circuit Court of Appeals proceeded to examine "the situation of the parties, their business needs and expectations, in gauging their intention," in order to determine whether the provisions of the instruments in question "fall within or without the evil."

In the instant case the record includes the mortgage pursuant to which the bonds were issued and the facts concerning the issue of the bonds have been stipulated. The bonds were originally sold to American purchasers and the rights to be determined on this claim are those of American bondholders represented by an American mortgage trustee. The Debtor is an American railroad company and its property and the security for the bonds are situated in the United States. In all the years between the issue of the bonds and the depreciation of the United States dollar in 1933, there was no demand for guilders (R. 134, 198), and the Debtor maintained no office for payment of guilders in Holland (R. 132, 159). The consideration received for the sale of the bonds was American dollars (R. 132, 160). The Debtor was borrowing money and not purchasing guilders or other foreign money (R. 134). The bond creditors were lending United States money and stipulating for its repayment and not selling guilders.

The Debtor's First Terminal and Unifying Bonds were issued to evidence the Debtor's liability for the repayment of sums of United States money borrowed; they were not issued upon a sale or purchase of guilders or other foreign money; the provisions contained in said bonds for optional payment in guilders or other foreign moneys were an assurance, in addition to the "gold clause" contained in the bonds, to the holders thereof against a depreciation in the value of the United States dollar; the amount of guilders mentioned in the bonds was at the time of the issuance of said bonds the equivalent of \$1,000 United States gold coin of the standard of weight and fineness as it existed on January 1, 1912, and it was understood, and specified in the indenture under which said bonds were issued, that the amounts of guilders, pounds, francs or marks mentioned in said bonds were each the equivalent of United States gold coin in said amounts and of such standard of weight and fineness (R. 134).

Under these circumstances it is fair to assume that the bondholders expected repayment in United States money. The American holders of the bonds certainly regarded the obligations as payable in United States money and relied primarily upon the promise to pay in that money.

The mortgage shows that the bonds were primarily United States gold coin obligations and that the foreign moneys were intended as equivalents for United States gold coin. Article First, Section 4, of the mortgage (R. 39), which is quoted in full, supra, provides:

“but the face amount of each of such coupon bonds shall be \$1,000 in United States gold coin of the standard of weight and fineness existing on January 1, 1912, or the equivalent thereof, calculated at the rates of exchange stated in the form of coupon bond hereinbefore set forth.”

A mortgage trustee obtains its rights from the mortgage and not from the bonds. In *In re Paramount Public Corporation*, 72 F. (2d) 219, 222, the Circuit Court of Appeals for the Second Circuit said:

“Its* claims are based upon the covenants in the indentures, and not on the bonds.”

Here we have a claim of a mortgage trustee and we must look to the mortgage for a basis of the declaration of the trustee's claim.

Petitioner waves aside the above language in the mortgage. The 2,490 guilders called for by the foreign money option in the First Terminal and Unifying Bonds were the equivalent of \$1,000 United States gold coin at the time of the issue of the bonds. In spite of this, petitioner says that the manner in which that amount of 2,490 guilders came to be fixed is completely immaterial here. We say

*The mortgage trustee's.

it is one of the most important facts in the case in that it clearly shows the intention of the parties. The parties did not contemplate a development whereby the foreign moneys called for by the foreign money option clause would become more than the equivalent of United States gold coin. This is made clear by Article Second of the mortgage dealing with the issue of First Terminal and Unifying Bonds. These provisions are summarized in the letter of the President of the Debtor to the purchasers of the bonds and in the bond prospectus prepared by the purchasing syndicate (R. 133, 160). By these provisions First Terminal and Unifying Bonds of a given face amount were to be issued against the retirement of an equal face amount of underlying bonds, or against the expenditure of a like amount in additions and betterments. Certainly the draftsmen of the instrument would have been shocked at the thought that they had provided for the issue of a First Terminal and Unifying Bond calling for the payment of guilders worth approximately \$1,690 as against an expenditure of \$1,000 in the retirement of underlying liens or in additions and betterments. The provisions of the mortgage, as well as the circumstances of the parties, emphasize the fact that the foreign moneys were regarded as the equivalents of United States gold coin. A further indication that the amounts in foreign moneys called for by the foreign money option clause were considered as the equivalents of the principal amounts of the bonds in United States gold coin is that the foreign money options were inserted in the coupon bonds but not in the registered bonds, and yet the bonds were interchangeable and the habendum clause of the mortgage provided that there should be no preference between the bonds thereby secured.

In the letter and prospectus describing the original issue of the First Terminal and Unifying Bonds, the

we have said, another promise which, as it turned out, threatens to increase the indebtedness of the Debtor by approximately 70 per cent. In the case of the First Terminal and Unifying Bonds the holder did not take the risk of the depreciation in the guilder because he was entitled to receive the consideration paid in dollars unless he elected otherwise, but he was, without any compensating risk on his part, accorded the privilege of securing the benefit of an appreciation in guilders. The appreciation of the guilder had no relation to any risk assumed or consideration paid by an American holder of the bonds.

The petitioner has argued in the courts below that the purchasers of the bonds from the Debtor paid United States gold coin therefor, and that consequently an alternative promise which does no more than to preserve to the bondholders the value of the gold coin paid cannot be condemned as constituting a fictitious increase in indebtedness. It may be that this is an effective answer to the contention of the respondents that the allowance of the claim made by the petitioner in this proceeding will result in a fictitious increase in indebtedness prohibited by the Missouri Constitution and statutes, but the answer of the petitioner leads inevitably to the conclusion that the bond contract is within the reach of the Joint Resolution. In contending that the optional promise to pay guilders is to be sustained under the Missouri Constitution and statutes because the guilders so promised are the fair equivalent of the United States gold coin received by the Debtor corporation and promised to be repaid by the bond contract, petitioner in effect concedes that the bonds are money contracts designed to secure the repayment of United States gold coin or its value. The very validity under state law of the optional promises to pay foreign moneys rests upon the assumption that they are a further assurance for the repayment of United States gold coin.

Guaranty Trust Company attempts to make the bond contract one for the payment of "neither gold nor money." Can there be any doubt that here a money debt was intended? Consideration of the mortgage, the bonds, the evidence, and the applicable Constitutional and statutory provisions in Missouri dispels any doubt as to this, and, to borrow the language of this Court in the **Holyoke** case, "The fact is of little moment that currency is characterized as a commodity, * * * as long as it is currency." There is no magic in the word "guilders." And in bankruptcy "guilders" means the dollar equivalent of guilders. Clearly this is a money debt. In the circumstances surrounding the issuance and sale of these bonds there is no indication of a sale or purchase of foreign money—of a commodity. It was a money transaction. As stated by the Circuit Court of Appeals in the opinion below: "These contracts are money and not commodity contracts."

If the foreign moneys are the equivalent of United States gold coin for the purposes of the mortgage, they should be regarded as such equivalent for the purpose of applying the Joint Resolution. It is submitted that it is a narrow and captious construction of the Joint Resolution which would give it effect as invalidating promises to pay United States gold coin and deny it effect in relation to provisions to pay United States gold coin, or, at the option of the promisee, the equivalent of United States gold coin.

Johnson v. Joyce, 90 Minn. 377, 97 N. W. 113, applying a statute forbidding usury, is analogous. The respondent in that case executed his note as follows:

"On or before November 7th, 1897, for value received, I promise to pay to John B. Johnson, or order, \$497.00. If not paid when due this contract shall draw interest from maturity at the rate of 10% per annum. This agreement may be paid at the option of the makers thereof in No. 1 Northern Wheat, delivered to said John B. Johnson, at elevator at Osakis, Minn., on or

before maturity thereof at the rate of \$1.50 per bushel, or if found in lower grades, at a proportionate price per bushel."

It was held that the agreement was usurious, the specified interest rate being unlawful, and that the alternative in reference to the delivery of wheat could not be enforced, since it was an alternative for the payment of usurious interest in money which latter provisions gave "tinge and color to the whole instrument."

As this Court has said in considering this very statute, **Holyoke Water Power Co. v. Paper Co.**, supra, page 340, "Things that are equal to the same thing are equal to each other." Once it is established, as it is in the record here, that the foreign moneys were intended as the equivalent of United States gold coin, the application of the Joint Resolution is inescapable. Whether or not **Anglo-Continental Treuhand, A. G., v. St. Louis Southwestern Railway Company**, supra, was decided correctly, upon the facts before the court and upon the premises assumed in the opinion, it does not rule this case. Here the claim is on behalf of domestic holders for the principal of the bonds, upon a record showing conclusively that the primary obligation was to pay in United States gold coin and the foreign moneys were regarded as the equivalent of the gold coin.*

*Although the rights of foreigners who purchased bonds prior to June 5, 1933, are not directly involved here, the Court may desire a discussion of our position as to such bondholders. We contend that the Joint Resolution makes no distinction between foreign and domestic holders. When a foreigner holds an obligation payable in money of the United States containing an option which would permit the holder to require payment in money of a foreign country and the holder must resort to the courts of this country to secure payment, such foreign holder stands in no better position than an American holder. The hardship worked upon the foreign holder by this hard and fast application of the Joint Resolution is in fact no greater than the hardship imposed upon the domestic holder.

As we see it, the only possible argument that could be made in favor of giving the foreign holder different treatment would apply only to those foreigners who acquired their bonds prior to the passage of the Joint Resolution, June 5, 1933. Such argument might run somewhat as follows:

From the standpoint of the domestic holder who lends money with the

We respectfully submit that this case can and should be decided on our principal contention, which has been upheld by the District Court and the Circuit Court of Appeals, that the Joint Resolution requires the claim to be allowed only in United States legal tender, and that the bonds are payable, dollar for dollar, in United States money. As concluded by the courts below, the Joint Resolution of

primary hope and expectation of being repaid in money of the United States, the foreign money options merely afford protection against depreciation in the value of the American dollar. From the standpoint of a foreign holder who buys American bonds for the purpose of investment and with the expectation and purpose perhaps of receiving a return of foreign money upon payment of the bonds, the foreign money options are for the purpose of enabling such holder to get back the foreign money. In other words, the foreign money options from the standpoint of such foreign holder are not for the purpose of protecting such holder against depreciation of the money of the United States, but to enable him to get back foreign money. If, therefore, such foreign holder should prove that he had acquired the American bonds prior to June 5, 1933, as an investment with the expectation of being repaid in the money of his country, it might be held that such foreign holder stands in a different position from the American holder who relies upon the foreign money alternatives as a means of protection against depreciation of the American dollar. The legal result may be dependent upon the circumstances. From the standpoint of the domestic holder, enforcement of the foreign money options would enable such holder to evade the public policy of the United States. From the standpoint of the foreign holder, it would permit him to secure repayment in the money contemplated at the time of the investment.

From the standpoint of the foreign holder the enforcement of the foreign money options merely enables him to get the amount of foreign money which the bond contemplates that he would receive. From the standpoint of the domestic holder, the enforcement of the foreign money options would enable him to get a substantially larger number of United States dollars than the face amount of the bond.

In the case at bar we are dealing exclusively with American holders. The very argument which might be made by foreign holders, indicated above, is in itself an argument in support of our contention (supported by the courts below) that the Joint Resolution is applicable to domestic bondholders.

On this point the Circuit Court of Appeals said in the opinion below (R. 254):

"In what has been stated above, we have had in mind the situation before us. Whether a contract arising out of transactions between citizens and foreigners—such, for example, as purchase of foreign goods by citizens—wherein payment was provided at foreign cities in foreign currencies, even if such currencies were measured by defined gold dollars, is without our present consideration. Also, we have not considered contracts involving satisfaction in gold as a commodity. While foreign currencies are, if within this country 'commodities' in the sense that they have no standing as mediums of exchange, yet the contract provisions here provide for 'payment' in money only and in foreign monies only within foreign countries. These contracts are money and not commodity contracts."

amount of the Debtor's funded indebtedness, including the First Terminal and Unifying Bonds, per mile of railroad, and the amount of annual interest charges upon the First Terminal and Unifying Bonds and other bonds, were described in terms of United States dollars only (R. 160-162).

If there were any doubt as to the meaning of the mortgage provisions, it is dispelled by applicable constitutional and statutory provisions in the State of Missouri. As previously pointed out, the Debtor is a Missouri corporation. Article XII, Section 8, of the Constitution of the State of Missouri, and Section 4546 of the Revised Statutes of Missouri, 1929, make void any fictitious increase of indebtedness of Missouri corporations.* In view of the fact that these bonds were issued in consideration of an amount of United States money less than the principal amount of the bonds, the establishment of a claim for guilders would in effect be an increase of the indebtedness of the Debtor over and above the principal amount of the bonds, and this, we have argued, would be a ficti-

*Article XII, Section 8, of the Constitution of Missouri provides:

"Sec. 8. Stock and bonded debt, how issued or increased.—No corporation shall issue stock or bonds, except for money paid, labor done or property actually received, and all fictitious increase of stock or indebtedness shall be void. The stock and bonded indebtedness of corporations shall not be increased, except in pursuance of general law, nor without the consent of the persons holding the larger amount in value of the stock first obtained at a meeting called for the purpose, first giving sixty days' public notice, as may be provided by law." (Adopted 1875.)

Section 4546 of the Revised Statutes of Missouri 1929 provides:

"Sec. 4546. Stock and bonds, for what issued—capital stock, how increased—fictitious issues void.—The stock or bonds of a corporation shall be issued only for money paid, labor done or money or property actually received. Any corporation may increase its capital stock or its bonded indebtedness with the consent of the persons holding the larger amount in value of the stock, which consent to such increase shall be obtained at a meeting of the shareholders, called for that purpose, and of which meeting sixty days' public notice of the time, place and general purpose of such meeting shall be given by advertisement in a daily or weekly newspaper published in the town or city where the principal offices of the company issuing such stocks or bonds may be located. All fictitious issues or increases of stock or of bonds of any corporation shall be void." (R.S. 1919, Sec. 9740. Amended 1923, p. 315; 1925, p. 163.)

tions increase of the indebtedness of the Debtor for which it did not receive an equivalent in money paid, labor done, or property actually received, as required by the state Constitution and statutes. Such an increase is prohibited by the constitutional and statutory provisions of the State of Missouri, and is contrary to its public policy. These constitutional and statutory provisions were in effect from 1912 to date.

It is firmly established in Missouri that a corporation may not issue its stock for less than par. **Berry v. Rood**, 168 Mo. 316, 328, 67 S. W. 644; **Van Cleve v. Berkey**, 143 Mo. 109, 44 S. W. 743; **Garrett v. Kansas City Coal Mining Co.**, 113 Mo. 330, 20 S. W. 965. The sections of the Constitution and statutes referred to are as applicable to bonds as to stock, and have been so applied. **Kemmerer v. St. Louis Blast Furnace Co.**, 212 F. 63 (C. C. A. 8, 1914); **Mudge v. Black, Sheridan & Wilson et al.**, 224 F. 919 (C. C. A. 8, 1915).

We may concede that a Missouri corporation in 1912 could lawfully issue its bond for \$1,000 upon receipt of 2,490 guilders, the then equivalent of \$1,000. Likewise, the concession is in order that a Missouri corporation in 1912 could have issued its bond whereby it agreed to pay 2,490 guilders in consideration of the receipt of \$1,000. In such cases the promise contained in the bond is in respect to a different medium than the consideration received, and corporation and bondholder, respectively, take the chance of a variation in the future values of dollar and guilder. The instant case is different. The Debtor, in consideration of receiving \$1,000 or less in United States money, agreed to pay the \$1,000, with interest, and also agreed to another and alternative performance in the payment of guilders. The United States money consideration received was exhausted by the promise to repay that much and more, with interest, in United States money, and it could not support,

Petitioner's Argument II A 1 (pages 48 to 52, its brief).

Petitioner states that the Joint Resolution is confined to the nullification of the "traditional gold clause."

We have elsewhere in our brief developed the considerations for believing that the Joint Resolution applies to every bond payable in money of the United States, irrespective of options for payment in foreign moneys. We shall not repeat these considerations but shall limit ourselves to demonstrating that the assertion that the Joint Resolution dealt only with the traditional gold clause is unsound. We assume that by the "traditional gold clause" petitioner refers to the conventional agreement to pay in gold coin of the existing standard of weight and fineness, or of similar purport.¹ Congress could have dealt with the traditional gold clause by directing that all agreements to pay in United States gold coin should be discharged in United States legal tender without more. The Joint Resolution does much more. Section 1 (a) renders void a provision purporting to give the obligee a right to require payment in gold (a gold bullion contract); it renders void an agreement to pay in any kind of United States coin, which would include silver coin as well as gold coin; it renders void an agreement to pay in a particular kind of United States currency, which includes [see Section 1 (b) of the Joint Resolution] Federal Reserve notes and circulating notes of Federal Reserve Banks and national banking associations; it renders void an agreement to pay United States money measured by gold (a gold value contract) or by United States coin or currency, and, finally, it provides that **every** obligation payable in money of the United States shall be discharged in legal tender. Throughout the Joint Resolution such words of inclusive import as "every" and "any" are

¹ For enumeration of conventional gold clauses, see 20 Am. Bar. Assn. Journal 370 (June, 1934).

used, and only a mind approaching the case from a pre-determined bias could assert that the Joint Resolution is limited to a gold coin contract.

Petitioner's Argument II A. 2 (pages 52 to 62, its brief).

The petitioner has invited an examination of the accompanying legislation, committee reports, and Congressional debates to determine the intended scope of the Joint Resolution.

In these sources we find no direct reference to multiple currency bonds. We do perceive an unmistakable intent by Congress to relieve debtors from the duty to pay in a value measured by the previous gold coin and to direct that all money contracts, however worded, should be discharged, dollar for dollar, in United States legal tender, and, especially, Congress was intent upon there being no discrimination between debtors in the application of this legislation.

Congress had in mind on June 5, 1933, the devaluation of the United States gold dollar, as has been pointed out by this Court.

Congress was aware that a reduction in the gold content of the dollar would not only increase the dollar value of gold, but would also increase the dollar value of foreign moneys. On this point petitioner and respondents are in accord (see pages 54 to 57, petitioner's brief).

Congress felt that it could not exercise its constitutional power to reduce the gold content of the dollar without invalidating, as obstructions to that power, all contracts which operated to cast the burden upon debtors of compensating creditors for such devaluation. The Attorney General in his argument in **Norman v. B. & O. Railroad Co.**, 294 U. S. 240, said:

"I do not understand that any responsible person seriously disputes the right upon the part of the gov-

the second sentence thereof, where it directs affirmatively that **every** obligation, **heretofore or hereafter** incurred, payable in money of the United States, shall be discharged upon payment, dollar for dollar, in legal tender.

Petitioner's Argument I D (pages 39 to 46, its brief).

The petitioner's thesis is that the bond contract gave rise to no obligation until there was an election by the promisee as to the medium of payment, and that, since the purported election was to receive guilders, the only obligation that ever existed was for the payment of guilders.

If the respondents and the courts below are correct in regarding the bonds as payable in dollars unless an election for other performance is made, the petitioner's argument fails. If the promise to pay dollars is primary, the duty was to pay dollars unless or until that duty was dislodged by affirmative election by the promisee for other performance.

Petitioner's thesis is also untrue if the promises are regarded as equal alternatives. Petitioner loses sight of the distinction between obligation and liability, which was well stated in the passage quoted from Professor Williston's work on Contracts, *supra*, page 24. Professor Williston points out that in the case of a contract containing alternative promises, the **obligation** arises at the time the contract is made, although the particular **liability** is not determined until after election. Thus the First Terminal and Unifying Bonds were obligations which were capable of being paid in money of the United States at the time of the adoption of the Joint Resolution on June 5, 1933, although election as to the medium of payment had not been made at that time.

The fact that the character of a contract may be determined by an alternative promise contained therein prior to the exercise of an election of that alternative is illus-

trated by the cases cited in footnote 16 on page 43 of petitioner's brief. These cases hold that where a note contains a promise to pay money or deliver a commodity, it is payable in money so as to be negotiable. If these cases held that such a note is negotiable only after the money alternative had been elected, they would tend to sustain the petitioner's position. Since they hold that such a note is negotiable and payable in money prior to election, they sustain the respondents' position that the First Terminal and Unifying Bonds were payable in United States money prior to the purported election. See **Hotchkiss v. National Bank**, 21 Wall. 354, 358, in addition to the cases cited by petitioner.

Petitioner attempts to make an analogy between the case at bar and the cases cited on page 44 of its brief dealing with fire insurance contracts. These cases are distinguishable. First, they determine that the performance due under the contracts after election is to be determined in accordance with the election made, but they do not hold that these insurance contracts are to be regarded as building contracts *ab initio*. Second, the contracts there involved are not money contracts. In the case at bar the contract is purely a money contract, payable in United States gold coin or the equivalent thereof in foreign moneys.

If petitioner's reasoning is accepted, an alternative contract to pay \$1,000 in United States gold coin or 25,800 grains of gold nine-tenths fine is not an obligation payable in money of the United States if the gold bullion option is exercised, and is missed by the Joint Resolution entirely. We did not suppose that such an argument could be made after **Holyoke Water Power Co. v. Paper Co.**, *supra*.

tract must be treated as one for the payment of gold coin or its equivalent.

Petitioner's Argument I C (pages 32 to 39, its brief).

The petitioner argues that if one of the alternatives in an alternative contract becomes impossible of performance or is illegal, the other alternatives stand and their performance will be enforced. It is unnecessary for us to discuss this point in detail because we rest our case upon the premise that the Debtor's First Terminal and Unifying Bonds are as a whole obligations payable in money of the United States and are thus to be discharged under the second sentence of the Joint Resolution, dollar for dollar, in United States legal tender. However, it is desirable to note the true extent of the rule stated in 6 **Williston, Contracts** (Rev. Ed. 1938), Section 1779, quoted by petitioner on page 33 of its brief. The concluding sentence of this quotation is:

"If the whole transaction was for an illegal purpose, or probably if the illegal covenants showed gross moral turpitude, the other covenants, though in themselves perfectly legal, would not be enforced."

Authorities exemplifying the application of this principle are **Burlington C. R. & N. Ry. Co. v. Northwestern Fuel Co.**, 31 F. 652; **Baltimore & O. R. R. Co. v. Miller**, 183 Ind. 323, 107 N. E. 545. We believe it to be established in the record in this case that the parties to the bond contract had no use for foreign moneys as such, but that the whole contract was designed to secure for the creditors a return of United States gold coin of the 1912 standard or its equivalent in value. Thus the result sought to be accomplished by the contract as a whole and by each alternative therein was one which came to be condemned upon the adoption by Congress of the Joint Resolution of June 5,

1933. The whole transaction was for a purpose which, though legal when it was made, has by the passage of the Joint Resolution now become illegal and cannot, therefore, be enforced.

On page 35 of its brief petitioner makes the following concession:

"If these bonds had been issued after the passage of the Joint Resolution of June 5, 1933, then the question whether the foreign money alternatives were inserted in the instruments for the purpose of evading the Joint Resolution, by attempting to provide for 'a fourfold further assurance in these foreign currencies of values based on the specified gold dollar' (R. 253), might become relevant."

This amounts to a concession of the correctness of our contention that the purpose of inserting the alternatives is relevant, for the reason that the Joint Resolution strikes at past transactions as well as future transactions. It is true that there was no element of evasion of any existing statutory policy when the parties executed these bond obligations in 1912, any more than there was a violation of any existing statutory policy in the insertion at that time of the conventional gold clause. However, these contracts are to be performed after the passage of the Joint Resolution, and the Joint Resolution condemns any contract theretofore or thereafter made which tends and was designed to accomplish, after June 5, 1933, the result condemned. The fact and not the motive of illegality is controlling.

Petitioner concludes this portion of its argument (Brief, page 39) by stating that **unless the Joint Resolution** contains some affirmative provision to the contrary, the only effect of the nullification of the gold clause was to strike that clause from the instruments. The Joint Resolution **does** contain an affirmative provision to the contrary in

Petitioner misapprehends the point of the opinion of the Circuit Court of Appeals. That court pointed out that each of the foreign moneys mentioned in the foreign money options was intended as the equivalent of \$1,000 United States gold coin of 1912 weight and fineness, that each was equivalent at that time, and that payment of the foreign moneys in the future was promised as a further assurance to the creditors of securing the value of the United States gold coin of the 1912 standard of weight and fineness. It is also true that the guilder options, if enforceable, and in the petitioner's contention as to damages is accepted, would work out in this case to give the bondholders a claim for the equivalent in United States currency of the 1912 gold coin. It was not thought by the Circuit Court of Appeals, as petitioner seems to think (Brief, page 25), that the guilder options gave an absolute assurance of returning to the bondholders the value of the United States gold coin. This the Circuit Court of Appeals recognized when it said (R. 253):

"Since the face amount of the obligations is calculated in terms of the gold dollar at a specific date, the real effect is to give an option of payment in the most advantageous money (foreign or domestic) which, at the time of payment, nearest approaches the specified gold dollar value."

The option to pay 2,490 guilders, for instance, assured to the creditors the receipt of the value of \$1,000 of United States gold coin so long as Holland remained on its existing gold standard. The opinion of the Circuit Court of Appeals was based upon the fact that the foreign money options were intended to and did in some measure accomplish the purpose forbidden by the Joint Resolution. The contract is not to be saved from the application of the Joint Resolution because its purpose of securing to the lender the return of United States gold coin or its value may be d

feated by fortuities such as war, depression, and other events beyond the control of the parties, causing foreign countries to devalue their moneys. Indeed, the conventional gold clause, even in a case where it has not been rendered invalid by the Joint Resolution, has been held by this Court not to accomplish the result of securing to the holder of the obligations a payment in United States gold coin of a specified standard of weight and fineness. **Perry v. United States**, 294 U. S. 330. If the petitioner is correct, the foreign money option will secure to the creditor the value of United States gold coin, although a gold clause, where valid, would not have done so. The fact that the intent of the parties may be frustrated to some extent does not prevent the application of the Joint Resolution.

We believe the petitioner to be in error in its assumption on page 24 of its brief that the Circuit Court of Appeals' decision would have been different if the primary promise had been to pay in "United States money" rather than in United States "gold coin." Any obligation payable in money of the United States is within the terms of the Joint Resolution, and the first sentence in the Joint Resolution condemns equally an agreement to pay in gold or in a particular kind of currency of the United States.

The argument that the guilder alternative is not the equivalent of the gold clause is fully answered by the language in the indenture reading as follows (R. 39):

"the face amount of each of such coupon bonds shall be \$1,000 in United States gold coin of the standard of weight and fineness existing on January 1, 1912, **or the equivalent thereof**, calculated at the rates of exchange stated in the form of coupon bond hereinbefore set forth."

Therefore, the guilder alternative falls directly within the terms of the Joint Resolution for the reason that the con-

ever, is resolved by the indenture provisions. The provisions of a trust indenture not in conflict with the provisions of the bonds will control the rights of the parties. **McClelland v. Norfolk Southern R. R. Co.**, 110 N. Y. 469, 474, 18 N. E. 237; **Reitz v. Pontiac Realty Co.**, 316 Mo. 1257, 293 S. W. 382. Article First, Section 4, of the Indenture (R. 38, 39) provides:

"All or any of the coupon bonds * * * shall be payable at the office of the Railway Company in the Borough of Manhattan in the City and State of New York, or, at the option of the holders of said coupon bonds, in the cities and countries, respectively, and in the respective currencies stated in the form of coupon bond hereinbefore set forth, * * *."

Language could not be clearer to show that the bonds are payable in New York, in United States money, in the absence of an election by the holders of the bonds.

Even if the promises are equal alternatives, it is not true that the promise to pay guilders is unrelated to the promise to pay United States gold coin. To the contrary, the indenture provides (R. 39):

"the face amount of each of such coupon bonds shall be \$1,000 in United States gold coin of the standard of weight and fineness existing on January 1, 1912, or the equivalent thereof, calculated at the rates of exchange stated in the form of coupon bond hereinbefore set forth."

Thus by definition of the parties themselves, the foreign moneys are the equivalent of \$1,000 United States gold coin. The petitioner itself recognizes that the guilders were not desired for themselves, but rather were intended as a measure of value. It says on page 21 of its brief "There is no indication in the terms of the bonds and coupons, and there was no suggestion to purchasers a

the time of sale, that the holder could receive payment only in the currency of his domicile.”

If the petitioner's case rests, as it seems to believe, upon the proposition that the promise to pay guilders was independent of the promise to pay United States dollars, it must fail for the following reasons among others: (1) the promise to pay guilders was associated as an option or alternative with the promise to pay United States gold coin; (2) if the bonds are read together with the mortgage, it appears that the bonds are primarily payable in United States money and are so payable unless option for other payment is exercised; (3) the amounts of the foreign moneys are fixed in accordance with the terms of the indenture as the equivalent of the United States gold coin face of the bonds.

We cannot agree with petitioner's argument on pages 21 and 22 of its brief, where it seems to believe that the nature of the contract must be determined without resort to anything outside the face of the bonds. Certainly all the instruments, including the indenture, must be construed together. Moreover, the inquiry is to determine the nature of the contract for the purpose of applying the rule of public policy enunciated by Congress, and in that determination the Court is not bound by a parol evidence rule but must consider all pertinent facts. When thus considered, the question is conclusively determined by a necessary consideration of the unambiguous language used in Article First, Section 4, of the mortgage, and petitioner's statement that such language is at best a mere inference of a primary obligation to pay in United States dollars becomes meaningless.

Petitioner's Argument I B (pages 24 to 32, its brief).

* The guilder alternative was intended as an equivalent of and a supplement to the promise to pay in United States gold coin.

Congress of June 5, 1933, reaches and applies to every obligation payable in money of the United States, incurred before or after June 5, 1933, whether or not there is contained therein or made with respect thereto any provision which purports to give the obligee a right to require payment in gold or a particular kind of coin or currency of the United States or in an amount in money of the United States measured thereby, and every obligation payable in money of the United States must be discharged upon payment, dollar for dollar, in any coin or currency of the United States which at the time of payment is legal tender for public and private debts. (See conclusions of District Court, R. 140, 141.)

(C) As Applied to the Facts of This Case, the Arguments in Petitioner's Brief Are Not Persuasive.

The respondents have stated affirmatively the reasons why the Joint Resolution directs the method of discharge of the Debtor's First Terminal and Unifying Bonds. We shall now consider the arguments of the petitioner in the negative and give our answers to these arguments.

Questions Presented as Conceived by Petitioner (pages 2 to 4, its brief).

The respondents are of the opinion that questions are presented in this case in addition to those stated by petitioner, and, moreover, believe that the question as to the application of the Joint Resolution to the bonds should be stated so as to include all relevant facts, see pages 8 to 11, supra.

Petitioner's Statement of the Case (pages 6 to 11, its brief).

We have given our statement of the case, supra, pages 2 to 8. Petitioner's statement contains some disputable conclusions and some omissions.

The petitioner omits the provisions of the mortgage touching upon the foreign options quoted on page 3, supra.

The facts stated on page 8 are substantially correct, but we are unable to see that the fact that arrangements were made by the Debtor for payment in foreign moneys abroad leads to the conclusion that the Debtor had no thought of the foreign money options as further assurances of the repayment of United States gold coin or its value. Prior to the depreciation in the value of United States money in 1933, the holdings of the bonds in the countries whose monetary units were mentioned in the bonds, or in Europe generally, were negligible (R. 198). No request was made for payment in guilders by any one prior to 1933 (R. 134). We differ, of course, with the petitioner as to its power to make an election vested by the bonds in the bondholders.

Decision of the District Court (pages 11 to 14, petitioner's brief).

The Findings of Fact made by the District Court were based upon a record consisting of stipulated evidentiary facts supplemented by some oral and uncontradicted testimony. The Findings include findings of ultimate facts, for example, as to the purpose of the parties in inserting the foreign money options, based upon the evidentiary matter before the court. They are not conclusions of law and will be accepted by this Court unless the petitioner can show that they are unsupported by competent testimony. **United States v. Commercial Credit Co.**, 286 U. S. 63, 67. The petitioner does not accept as the basis of its discussion the facts found by the District Court below, but disregards them as immaterial, unsupported by evidence, or not findings at all. Petitioner does not point out in what respects the Findings should be ignored.

on these grounds, and in its argument often assumes the facts to be the exact contrary of the facts which were found by the District Court below. The Findings of the District Court are in every instance supported by competent, and in our opinion conclusive, evidence.

The conclusions of law of the District Court speak for themselves and do not need any defense from us.

Petitioner's Analysis of the Circuit Court of Appeals' Decision (pages 14 to 16, its brief).

We believe it true that the Circuit Court of Appeals construed the First Terminal and Unifying Bonds as imposing upon the Debtor a duty to pay gold dollars unless and until the optional payment in one of the other specified currencies was exercised. In other words, the promise to pay United States money was the primary one. This was in accord with the conclusion of the District Court (Conclusion of Law No. 3, R. 141). While the face of the bonds may leave uncertain which promise was primary, the mortgage supplies this deficiency and makes clear that the primary promise was to pay in money of the United States, i. e., that the bonds should be paid in that medium unless and until an election was made for other payment, *infra*, pages 75, 76. But neither the District Court (R. 141) nor the Circuit Court of Appeals based its decision upon this narrow point. The Circuit Court of Appeals found that the Joint Resolution directed the discharge in United States legal tender of all obligations which may (i. e., alternatively) be paid in money of the United States where the amount or value of the alternatives is based upon the gold dollar (R. 254). In other words, the Court held that where there exists an obligation capable of being paid in United States money, and where the alternatives to United States money payment were measured by United States money, such contracts were not only within the

language of the Joint Resolution, but were also within the very evil or mischief at which the Joint Resolution was aimed. Thus the opinion does not rest exclusively upon the finding that the dollar payment is the primary alternative, but the decision would undoubtedly have been the same had the Court found the alternatives to be equal.

Petitioner's Argument, Point I (pages 17 to 19, its brief).

Petitioner's assertion that the claim in controversy is based exclusively upon an absolute and independent contract to pay guilders in Holland simply is not true. The petitioner's claim is based upon the exercise of an option or alternative to be paid in guilders contained in a bond also payable in money of the United States, the foreign money options being inserted as the intended equivalent of the United States money loaned and to be repaid. The promise to pay guilders is interrelated with and dependent upon the duty to pay United States gold coin. Whether such a bond contract is as a whole within the reach of the Joint Resolution is the very question before the Court, and an argument based upon the premise that the promise to pay guilders stands entirely alone is arguing in a circle.

Petitioner's Argument I-A (pages 19 to 24, its brief).

Although we do not think that the case turns upon the point, we cannot agree with the petitioner that no one of the promised currencies of payment is primary and none is subordinate. To the contrary, we believe the case to be, as the District Court found (R. 141), that the bonds are payable in United States money unless election is made for payment in foreign moneys. It may be that the face of the bonds leaves undetermined the question as to the medium of payment if no election is made. Doubt, how-

because they are comparatively small in number. Such bonds represented a portion of the aggregate of bonds obstructing the power of Congress to devalue the dollar, and Congress had constitutional power to deal with every portion of the bonds presenting such obstruction. As a matter of fact, the amounts involved in connection with bonds containing foreign money options are much greater than the amounts involved in connection with leases of this character passed upon by this Court in the **Holyoke** case.

Neither is there a constitutional inhibition against Congress announcing a rule of public policy to be enforced by the courts of this country in respect to contracts wherever they are to be performed. **Union Trust Co. v. Grosman**, 245 U. S. 412. Does petitioner contend that it would be unconstitutional for Congress to deal with a contract between American citizens for the payment of United States gold coin of an existing standard of weight and fineness in London?

Arbitrary discrimination does not occur if the statute is given a general application so as to reach all United States money contracts containing provisions for compensating the creditors at the expense of the debtors in the event of monetary depreciation. To the contrary, arbitrary discrimination does occur if that result can be accomplished by one device and not by another.

We are not dealing in this case with a contract containing a primary commodity alternative to which the money alternative is subordinate, nor with a case where the commodity is sought for itself and not as a measure of money. We are concerned here with a contract for the repayment of United States money borrowed and with alternative promises designed to secure to the creditor United States gold coin or its equivalent in value.

We do not undertake to answer the arguments presented in the brief of Harry Hoffman, amicus curiae, as they are largely repetitions of the arguments made by the petitioner. Mr. Hoffman on page 48 of his brief refers to the case of **New Brunswick Railway Company v. British and French Trust Corporation, Limited**, decided by the House of Lords in England on December 13, 1938. This case in no way sustains any contention made by the petitioner or the amicus. In that case the defendant attempted to apply legislation adopted in Canada on April 10, 1937, somewhat similar to the Joint Resolution of Congress, to the bonds of a Canadian company payable in pounds sterling in England, of a specified standard of weight and fineness, where the action was brought in the English courts and where judgment had been applied for therein prior to 1937. The House of Lords decided the case for the plaintiff on the ground that the Canadian statute should be limited in its application to suits brought in Canada and also on the ground that it should not apply to a case where judgment had been requested prior to the enactment of the legislation. On the first point the Lord Chancellor said:

“in my opinion Section 4 must be confined upon its true construction to cases where the action to recover the amount due is brought in Canada, which would be a not uncommon case, and is not intended to have any application elsewhere.”

This language supports our contention in the instant case that the Joint Resolution should apply where the action or proceeding is between American citizens in the courts of this country.

No provision of the mortgage gives a right of election to petitioner. The portions of the mortgage upon which petitioner attempts to rely contemplate a judgment and sale upon default (Mortgage, R. 7). Here we have a bankruptcy proceeding where such steps are forbidden (R. 183). Nowhere in the mortgage is there any language giving the mortgage trustee the rights which it claims it has or can exercise in a bankruptcy case. There can be no foreclosure or entry here. There can be no sale. Petitioner can merely file a claim. A reading of the language of the indenture upon which petitioner relies will convince one that it cannot be stretched to give it the meaning which petitioner by wishful thinking has read into it. Even if petitioner could file an equity suit, it would be the duty of the mortgage trustee to determine the desires of the bondholders before it could ask for damages in one of the foreign currencies.

There is no implication of power in the trustee to make the election. The language of the mortgage is clear and unambiguous. Furthermore, implied powers of the kind mentioned in the authorities cited by petitioner below do not include a right in the mortgage trustee to transfer to itself powers which by the terms of the mortgage are clearly reserved to the bondholders.

Petitioner contended below that title to the debt passed completely to Guaranty Trust Company of New York, as trustee. In this language the mortgage trustee attempted to justify its usurpation of power (power given only to the bondholders). That this position is untenable hardly needs stating. If this were true, bondholders could not even file claims and much less make an election as to mode of payment.

Referring to this very section of the statute, the Circuit Court of Appeals for the Eighth Circuit said in **Blumgart**

v. St. Louis-San Francisco Ry. Co., 94 F. (2d) 712, certiorari denied 304 U. S. 567:

"The obvious intendment is that such creditors* can file such claims, and, if the trustee does not do so, must file such in order to secure recognition and classification in the reorganization proceedings. This statute having thus declared the rights of the bondholders, no provision in the deed of trust can prevent them exercising such rights. * * *

"In view of the statute, this mortgage is ineffectual as a bar to the right of individual bondholders to file their claims on their bonds and is ineffectual as a limitation upon such right to the extent that it is prejudicial to such right. Thus, this subsection provides a required way in which the bondholders must act to have their rights protected—either by the trustee filing a claim for all of the bondholders or the bondholders filing for themselves."

The First Terminal and Unifying bondholders can file proofs of claim and many have done so; many also have elected to receive dollars instead of guilders. If any doubt on this point ever existed, it was resolved against the contentions of petitioner by the Eighth Circuit Court of Appeals in the **Blumgart** case, *supra*, where that Court, speaking through Judge Stone, said:

"The bondholders are the creditors under a mortgage." (Citing cases.)

Flying in the face of this decision, petitioner asserted that it is the creditor. See, also, **In re Allied Owners Corporation**, 74 F. (2d) 201, which announced principles which were approved by the Circuit Court of Appeals for the Eighth Circuit in **Bitker v. Hotel Duluth Co.**, 83 F. (2d) 721 (1936).

Even if we were to assume that in some manner this

*Bondholders.

II.

ASSUMING THAT THE GUILDER OPTION IS VALID, GUARANTY TRUST COMPANY OF NEW YORK, AS MORTGAGE TRUSTEE, HAD AND HAS NO RIGHT UNDER THE TERMS OF THE BONDS, COUPONS OR THE MORTGAGE, OR UNDER AMENDATORY SECTION 77, TO MAKE AN ELECTION ON BEHALF OF HOLDERS OF ANY OF THE BONDS OR COUPONS FOR GULDERS OR ANY OTHER OF THE SEVERAL FOREIGN MONEYS MENTIONED IN THE MORTGAGE, THE ELECTION BEING SPECIFICALLY RESERVED BY THE TERMS OF THE BONDS, COUPONS AND THE MORTGAGE TO THE HOLDERS OF THE BONDS AND COUPONS.*

Let us assume for the moment that this Court is unable to uphold the ruling of the courts below on the ground that the Joint Resolution applies to these bonds and coupons. We contend that regardless of the decision on this point the result reached by the courts below may and should be sustained on other grounds. We contend that the guilder election, if its exercise after June 5, 1933, is valid, is specifically reserved by the terms of the bonds, coupons and the mortgage, to the holders of the bonds and coupons.

The coupon bonds, which bear the optional payment clause, state that payment will be made **"at the holder's option"** at the designated offices in the cities mentioned and the mortgage itself contains a similar provision. Any contention that the mortgage trustee, as representative of the bondholders, has the right to make the election as to mode of payment is conclusively answered by these four words: **"at the holder's option."**

The provision in Article First, Section 4, of the Mort

*As explained supra, page 10, petitioner did not brief this point, but respondents deem it essential to present all points involved.

gage (R. 38), in respect to payment of the bonds, is as follows:

"All or any of the coupon bonds issued hereunder from time to time shall be payable at the office or agency of the Railway Company in the Borough of Manhattan in the City and State of New York, or, **at the option of the holders of said coupon bonds**, in the cities and countries, respectively, and in the respective currencies stated in the form of coupon bond hereinbefore set forth, but the face amount of each of such coupon bonds shall be \$1,000 in United States gold coin of the standard of weight and fineness existing on January 1, 1912, or the equivalent thereof, calculated at the rates of exchange stated in the form of coupon bond hereinbefore set forth."

The First Terminal and Unifying coupon bonds provide (R. 19):

"Payment of the principal and interest of this bond will be made, **at the holder's option**, at the office or agency of the Railway Company * * * in the City and State of New York, or at designated offices in the foreign cities and countries above mentioned."

It does not admit of doubt that there must be an election by the **holders** of the bonds to make the bonds payable in guilders. In the absence of such election the bonds are payable in dollars (R. 38).

Petitioner relied below on a notice to bondholders stating that the mortgage trustee intended to elect guilders (R. 177). But the mortgage gives the mortgage trustee no such right. The mortgage says that the guilder election may be made "at the holder's option"; it does not say that the trustee may give notice of an intention to exercise the option for the holders of the bonds. Petitioner, however, claims that the power of election is one of its essential rights (Brief, page 41).

plain the meaning of the word "payable." The statement by Representative Steagall, quoted on page 77 of petitioner's brief (77 Cong. Rec. at 4583 miscited by petitioner as 4528), to the effect that the Resolution declares that contracts requiring the discharge of obligations solely by payments in gold are contrary to public policy, obviously was made in course of debate and is not an accurate statement of the Joint Resolution. Irrespective of the point in controversy in this case, the Joint Resolution does not itself so limit its application, but declares contracts requiring payment in a particular kind of coin or currency or in an amount in money of the United States measureable by gold or a particular kind of coin or currency to be invalid, as well as contracts payable in gold. It is interesting that the petitioner finds it necessary to interpolate the word "solely" before the word "payable" in the Joint Resolution in order to attempt to make its point as to the limited application of the Resolution.

Petitioner's Argument II B 2 (pages 80 to 82, its brief)

On page 81 the petitioner confuses the distinction between "due" (as meaning "matured") and "payable." The Circuit Court of Appeals below said that the bonds were payable on June 5, 1933, in money of the United States. It did not say that the bonds were due on that date, as petitioner seems to think. Neither respondent nor the courts below stated that Congress intended to accelerate the maturity of contracts containing multiple currency clauses as of June 5, 1933.

Petitioner's Argument II B 3 (pages 82 to 88, its brief)

Petitioner complains that if the second sentence of the Joint Resolution is given its literal meaning it would accomplish the entire purpose of the Joint Resolution without the necessity of specifically condemning certain types

of clauses in the first sentence of the Resolution. Petitioner argues that therefore it should be limited to obligations containing the clauses mentioned in the first sentence; despite the careful inclusion in the second sentence of the clause "whether or not any such provision is contained therein or made with respect thereto." Petitioner wishes to read "whether or not" as meaning the same as "if." To reach the construction desired by petitioner, words must be read as implying the exact antithesis of their proper meaning.

On page 85 we have again the admission by petitioner that if a foreign money option had been inserted in an instrument for the express purpose of avoiding the ban on gold clauses found in the Joint Resolution, then there might be sufficient basis for bringing that clause within the Resolution. If it is illegal to accomplish indirectly the result condemned by the Joint Resolution after June 5, 1933, we submit that it is illegal to enforce after June 5, 1933, contracts entered into before that date indirectly accomplishing the same result.

Petitioner's Argument III (pages 88 to 98, its brief).

We need devote only a few words to petitioner's argument concerning the alleged unconstitutionality of the Joint Resolution if applied to the foreign money options here involved. The constitutionality of the Joint Resolution as it applies to the traditional gold clause has been upheld by this Court in **Norman v. B. & O. Railroad Co.**, 294 U. S. 240. If respondents' contentions as to the true nature of the bonds in question, as expressed herein, are correct, the Joint Resolution as applied to the foreign money alternatives is constitutional. There is no constitutional inhibition against removing the obstruction to the power of Congress to regulate the value of money presented by bonds containing foreign money options merely

We have one comment to make upon the distinction which the petitioner endeavors to draw (on page 70) between the **Holyoke** case and the instant case. Petitioner says that each of the alternatives in the **Holyoke** case, viz., the alternative to secure bullion and the alternative to receive money of the United States, was condemned by the Joint Resolution. This assertion overlooks the fact that the bullion alternative was condemned only if it were contained in an obligation payable in money of the United States so that the preliminary determination of the Court was necessarily that such an alternative contract was payable in money of the United States. If it is payable in money of the United States, the second sentence of the Joint Resolution directs the method of discharge. Furthermore; upon the facts of the case at bar, however it may be in regard to multiple currency bonds as a group, we cannot agree that the promises to pay in foreign moneys amounted to more than promises to pay the equivalent of United States gold coin. When the contract is viewed as a whole in its setting, it is apparent that the promisees did not desire guilders per se, but merely as a means of securing the value of the United States gold coin. However the contract may be verbally expressed, its true intent was to pay \$1,000 in United States gold coin or the equivalent thereof in specified foreign moneys. **The striking resemblance between this case and the HOLYOKE case is that the American bondholders in this case had no more use for the guilders as such than the lessor in the HOLYOKE case had use for bullion.**

This Court has found the Joint Resolution to be constitutional, and accordingly debtors having issued bonds containing gold clauses may discharge their indebtedness in legal tender. **Norman v. B. & O. Railroad Co.**, 294 U. S. 240. This Court has found that the gold clause contained in United States Government obligations could not be invalidated by legislation, but it further found that the hold-

ers of such bonds had not established the fact that they incurred any damage by reason of being paid in United States currency, so that in effect such holders were confined to legal tender. **Perry v. United States**, 294 U. S. 330. This Court has held that where, in order to avoid the contingency of monetary depreciation, a lessor has contracted for payment in either gold bullion or in money of the United States measured thereby, the Joint Resolution directs that the obligation may be paid in an amount of United States currency equal to the gold coin by which the bullion obligation had been originally measured in the lease. **Holyoke Water Power Co. v. Paper Co.**, 300 U. S. 324. It has been held that the United States Government may call and redeem in legal tender the obligations which were subject to redemption according to their face in United States gold coin. **Smyth v. United States**, 302 U. S. 329. These rulings are proper and consistent and they carry out the underlying purpose of adjusting the domestic economy to the new order created by the reduction in the gold content of the dollar. Can it be that this Court, having advanced step by step to the very threshold of this case, will now turn back and find that there is a way whereby parties in the past have avoided, and parties in the future may avoid, the provisions of the Joint Resolution?

Petitioner's Argument II B 1 (pages 74 to 80, its brief).

This part of petitioner's brief is in response to the respondents' argument set forth at pages 21 to 33, *supra*.

We have pointed out above, page 23, that whether or not the word "obligation" is used as indicating the instrument or the duty, it is clearly employed in the Joint Resolution as meaning the whole instrument or the whole complex of duties arising from the bond contract.

The quotations from the Congressional Record appearing on pages 76 and 77 of petitioner's brief do not ex-

of the definitive valuation of the dollar to relieve those parties who were United States money debtors from an intolerable enhancement of their indebtedness by reason of the Congressional action, and an equality of treatment was the **desideratum** sought. Can it be believed that any member of that Congress voting for the Joint Resolution intended that a loophole should be left whereby a bondholder, by running around an international stump, passing through Holland en route, could enrich himself substantially at the expense of the Debtor and other creditors?

The record before Congress strongly refutes the suggestion which has been made by petitioner and by counsel representing like interests to the effect that the second sentence of the Joint Resolution was not intended to have independent force, but was inserted merely to implement and make effective the first sentence of the Joint Resolution. It will be observed that the Committee Report of the House, quoted on page 58 of petitioner's brief, gives equal emphasis to the content of the first sentence of the Joint Resolution and the content of the second sentence of the Joint Resolution. Senator Fletcher said (Cong. Rec. 73d Cong., 1st Session, page 4991):

"The Joint Resolution provides that every obligation, whether or not it contains a gold clause, shall be discharged upon payment, dollar for dollar, in legal tender."

It may be said that the first sentence of the Joint Resolution condemns specific provisions, and that the second sentence of the Joint Resolution gives the rule of equality of treatment in respect to all obligations payable in money of the United States, which was the thing uppermost in the mind of Congress.

The petitioner states, on page 59 of its brief: "The primary and apparently the only purpose of the Joint Resolution was thus to combat the unnatural demand

gold in this country." That demand had been combated by prior legislation making United States money irredeemable in gold. The purpose of the Joint Resolution was to avoid the burden upon debtors of paying additional currency on account of gold clauses and other clauses of the same effect contained in bonds payable in money of the United States. This is further indicated by the very language of the preamble of the Joint Resolution, which refers to the obstruction of the power of Congress to regulate the value of the money of the United States, and by reference to the inconsistency between gold contracts and the declared policy of Congress to maintain at all times the equal power of every dollar coined or issued by the United States in the payment of debts.

Petitioner says (page 60, its brief): "There can be no question that the options were deliberately inserted in the bonds and coupons as a special inducement to purchasers, both citizens and aliens." We agree, but, we ask: As a special inducement for what? The Circuit Court of Appeals below furnished the answer (R. 253):

"the holder is secured from depreciation of the gold dollar not only by a gold clause provision but by a fourfold further assurance in these foreign currencies of values based on the specified gold dollar."

In other words, the special inducement, we submit, was that the provision afforded a facile method by which every bond and interest coupon, whether owned abroad or in this country, could be easily converted into payment in domestic gold dollars of a given weight and fineness or a foreign money measured thereby, most advantageous to the holder at the time of payment.

Petitioner's Argument II A 3 (pages 62 to 72, its brief).

Under this point petitioner endeavors to answer arguments heretofore made by us, *supra*. Our views have been sufficiently expressed.

ernment to lessen the gold content of the dollar. Nevertheless, that power could not have been actually used if it entailed the redemption or payment of \$100,000,000,000 of obligations at the rate of \$169,000,000.000."

From the debates in Congress it is apparent that Congress had in mind not only the relief of debtors from the deplorable consequences which would otherwise follow from a reduction in the value of the dollar, but also an equalization of the burden as between various classes of debtors. Throughout the Congressional debates it was insisted that the Joint Resolution should be applied without discrimination between different classes. Mr. Steagall, Chairman of the Committee in charge of the Resolution in the House of Representatives, said (Cong. Rec., 73d Cong. 1st Session, at page 4586):

"We cannot pay either class of these debts in gold and it is against public policy, it is contrary to every dictate of common sense and justice to undertake to differentiate between creditors whether the Government or of individuals. Common sense and common honesty suggest that there should be one standard of value in this country and one kind of requirement to discharge an indebtedness on the part of a citizen or on the part of the Government.

* * * * *

"So far as the resolution itself goes it simply reaffirms the existing status. I do not see how this action alone could bring about the cheapening of money which is so much deplored by those who oppose the resolution. If I had my way I would not under any conditions permit one citizen to contract for the discharge of a debt in one kind of currency and another citizen to contract for the discharge of a debt in another kind of currency. It seems to me sound public policy demands that there be no discrimination."

As an example of what a Congressman supporting the enactment of the Joint Resolution thought it accomplished, we quote from the remarks of Mr. Cross in the House of Representatives (Cong. Rec., 73d Cong., 1st Session, page 4799):

"Now, let us talk about the moral part of this a moment. Oh, they say it is repudiation. Why, all we propose to do is to see that equal justice is done to both creditor and debtor."

Representative Reilly expressed the same thought (Cong. Rec., 73d Cong., 1st Session, at page 4803):

"Again, it is submitted that it is inequitable for the Government of the United States to permit a situation to exist whereby a debtor who borrowed a dollar several years ago must pay today, in the liquidation of that debt, a dollar having a purchasing power of at least a dollar and a half.

"It is not dishonorable for the debtors of our country to ask the right and privilege of paying their debts in dollars near the purchasing power of the dollars that they borrowed years ago."

Senator Barkley, in the debates in the Senate, said (Cong. Rec., 73d Cong., 1st Session, page 5011):

"they [bonds] do not have a value that would be lost, because the enactment of this joint resolution will have no effect upon the real value of those bonds. But the owners of those bonds might be deprived of garnering an artificial profit which they might otherwise obtain if their bonds had to be paid in gold, while future bonds are to be paid in any money that is legal tender in the United States. There is quite a difference between taking away from somebody what he has and taking away from him the opportunity to make more out of it than he should at the cost of the welfare of the United States and the condition of our people."

It was the aim of Congress prior to the accomplishment

were done in its capacity as trustee under the powers erroneously assumed to have been granted by the indenture. Thus, the so-called election does not purport to be an election on behalf of bondholders and the so-called authorizations do not purport to be such elections as are required by the mortgage.

In acting as trustee, Guaranty Trust Company was much the Debtor's representative as it was the representative of the bondholders. In enunciating the Missouri rule on this aspect of mortgage trustee relations Judge Wagner said, in **Goode v. Comfort**, 39 Mo. 313, that

"Trustees are considered as the agents of both parties—debtor and creditor—and their action in performing the duties of their trust should be conducted with the strictest impartiality and integrity. They are intrusted with the important function of transferring one man's property to another, and therefore both reason and justice will exact of them to scrupulous fidelity."

This case is cited with approval in **Chas. Green Real Estate Company v. St. Louis Mutual House Building Company et al.**, 93 S. W. 1111 (S. C. Mo., 1906), and in **West Axtel**, 17 S. W. (2d) 328, 334 (S. C. Mo., 1929). Under this rule it appears that a trustee must impartially execute his duties and avoid favoring the mortgagees.

It is not necessary to speculate as to why the bondholders failed to make the election. Perhaps it was because the bondholders tacitly perceived the considerations which caused the observation of the court in **City Bank Farmers Trust Co. v. Bethlehem Steel Co.**, supra, that "Mindful of its underlying purposes, good citizenship requires that the resolution should be accepted in a spirit which will not permit an unfair advantage of the creditor at the expense of the Debtor." Perhaps it was because the holders of the bonds felt safer in having them payable in American

money than to experiment with payment in a European money with which they were not familiar. Perhaps it was because of indifference. Whatever the cause, the holders having refrained from making an election to receive guilders, the mortgage trustee cannot make such an election.

The petitioner apparently was puzzled as to the election feature, for the proof of claim states that the election is made "except on those bonds or coupons, the holders of which have made their own elections as to the money of payment." Thus petitioner tried to make an election with reservations—it elects guilders and yet it does not elect guilders. This half-hearted effort clearly indicates that the mortgage trustee realized that it had no power to make a final election. **We go one step farther and say that it has no power to make an election of any sort.** The petitioner, when it made "demands" abroad, had no bonds—at least no bonds here involved—and it has recognized its inability to make a final election for the holders of the bonds. An election must work both ways and be binding upon creditor as well as debtor.

Clearly, among the various powers conferred upon the mortgage trustee by this indenture there was not included the power to exercise an election of the medium of payment. This power is reserved to the bondholders. We submit that if the guilder clause has any validity it can be applied only to those bondholders who, in exercising their own discretion, made a valid and timely election for allowance of their claims on a guilder basis. If the Court should so hold, each individual claim of bondholders who filed claims and purported to elect guilders would require a full hearing to determine the validity and timeliness of the exercise of the option and the measure of damages, if any, and provision is made therefor in paragraph 19 of the stipulation (R. 168).

to prosecute all actions clearly contemplates such actions as are in the interest of the bondholders as a class and is not intended to apply to a single cause of action which cannot affect the bondholders as a class. **Pigeon River Ry. Co. v. Champion Fibre Co. (C. C. A.), 280 F. 557."**

In **Denney v. Cleveland & Pittsburg R. Co.**, 28 Ohio S. 108, it was held that the right to convert bonds into stock existed in the holder of the bonds, and could not be transferred independently of the bonds. The court said (page 114):

"The truth is, as we apprehend, that by the express terms of this convertible clause the conversion of the bond into stock is made to depend wholly upon the pleasure of the holder of the bond. * * * The terms of the clause clearly connect the right of conversion with the ownership of the bond as indissolubly as a mortgage is connected with a debt, the payment of which it secures."

In **Cheatem v. Wheeling & Lake Erie R. R. Co.**, 37 (2d) 593 (D. C., S. D., N. Y.), the court, considering rights in respect to convertible preferred stock of the railroad company, observed:

"The option given in the certificate under consideration here is in effect an offer to each person who becomes a holder of record of the preferred stock, and like any other offer, can be accepted or availed of only by the persons to whom it is made and must be accepted or availed of precisely in accordance with its terms."

In **Werner Harris etc. v. Equitable Trust Co.**, 35 F. (2d) 513 (C. C. A. 10), it was held that the trustee of a bond issue was without power to bid in the property upon foreclosure sale in behalf of the bondholders, the court reason-

ing that "Each bondholder has the absolute right to determine for himself, in case of default, whether he shall take his loss and quit or continue to gamble."

It has been held frequently that the granting of rights in a mortgage to a trustee does not bar purely individual rights of the bondholders, and that a bondholder may forego the mortgage security and sue on his bonds. See **Dunham v. Omaha & Council Bluffs Street Ry. Co.**, 25 F. Supp. 287 (advance sheets); **Manning v. Norfolk Southern R. Co.**, 29 F. 838; **Muren v. Southern etc. Co.**, 160 S. W. 835 (Mo. App.), and note, 108 A. L. R. 88. By analogy these authorities apply here, for in the instant case the individual rights of the bondholders in regard to an election are even stronger. The mortgage specifically reserves these rights to the bondholders.

The mortgage in the instant case is clear in its terms. But even if this indenture were ambiguous as to the rights, duties and obligations of the mortgage trustee, petitioner's contention that it has a right to make the guilden election could not be sustained. On this point **Quindry on Bonds and Bondholders** (1934) says at page 307:

• "While the trustee is a representative of the bondholders, it acts in such representative capacity only within the limits of its authority, and it is only in executing the trusts that it represents the bondholders. **Where its powers are disputed, and the interpretation of the language conferring its power is ambiguous, it does not represent and cannot bind the bondholders relative to that question.** In a case where such questions are involved, the bondholders are necessary and proper parties."

See, also, **Johnstown and G. R. Co. v. New York Trust Co.**, 233 App. Div. 443 (1931), 254 N. Y. S. 266; **Colorado & Southern Railway Co. v. Blair**, 214 N. Y. 497, 108 N. E. 840 (1915), rehearing denied 215 N. Y. 697, 109 N. E. 1071.

It may be confidently asserted that there is no case among all judicial precedents which permits a corporate mortgage trustee to exercise the election of a holder of a secured bond to have the bond converted into stock. As is observed in the above cases, the right to convert is an individual right not affecting the class as a whole, depending upon the business discretion and choice of the investor owning the bonds. The exercise of an election to choose alien moneys instead of United States money is likewise an individual right not affecting the class as a whole, and depending upon the business discretion and choice of the investor who owns the bonds.

The attempt was made below to construe language used by the railway Trustee as an admission against interest. In our motions to dismiss certain intervening petitions of a bondholder we said that the mortgage trustee has the right to represent the interests of all bondholders. It is hardly necessary to point out that we referred there to interests which the mortgage trustee had the **right** to represent under the mortgage and statutory provisions. We have never, at any time, admitted that the mortgage trustee has power to exercise the foreign money option.

Petitioner made the assertion below that even the silence of bondholders constitutes a ratification of the trust company's "election." In other words, petitioner would have the Court believe that the only persons who are given the right to elect made a guilden election by remaining silent. Lack of action was interpreted as meaning: "We want guilders." Petitioner referred to ignorance of the bondholders as to their rights and to their helplessness. Even if these allegations be true, the condition cannot be remedied by reading into the mortgage something which is not there.

Although petitioner boldly asserted that it is a creditor and that title to the debt passed completely to it and that it had the right to elect, signs of weakening appear

when reference was made in its brief below to certain so-called letters of authorization received from a few bondholders. Why were authorizations necessary if the mortgage trustee has such omnipotent powers? The letters are worth nothing. They cannot constitute an election because they were not addressed or communicated to the Debtor or its Trustee. Obviously, an election by a promisee must be made by addressing and delivering a communication to the promisor or to its representative, and in this case the party exercising the election could do so only by letter or other communication to the obligor, the St. Louis Southwestern Railway Company, and to its representative, Berryman Henwood, Trustee. See 13 Corpus Juris 629; **Bohall v. Diller**, 41 Cal. 532. In no event could the letters have any bearing on the acts of the mortgage trustee, which, as it has stipulated, were done by it solely as trustee under the mortgage.

The purported election by Guaranty Trust Company of New York was made in its capacity as trustee, and it so stipulated (R. 160). In paragraph 9 of the stipulation (R. 160) it was agreed "the acts done as aforesaid were done by Claimant as Trustee of the said indenture"—referring to the attempted demand in Amsterdam, Holland, and the filing of proof of claim as set forth in paragraph 8 of the stipulation (R. 159). This is clear enough from the bailiff's certificate, attached as Exhibit A to the stipulation (R. 169); wherein it appears that the demand made in Holland was in behalf of the Guaranty Trust Company of New York "acting in this instance in its capacity of trustee under an Indenture of Mortgage." In paragraph 9 of the stipulation (R. 160) the petitioner reserved a right to show that acts performed had been expressly authorized by certain bondholders. This it has attempted to do, but the difficulty is that the acts done by petitioner were not done as agent for particular bondholders, but

neither the interest nor the principal is payable at the office of the trustee, or through its agency, the bondholders, after purchase, deal directly with the mortgagor, and generally only in case of default do they invoke action on the part of the trustee."

In **Moran v. Hagerman**, 64 F. 499, 505, the Circuit Court of Appeals for the Ninth Circuit applied the rule that "It is only where the trustee acts for the bondholder within the scope of the powers conferred upon him by the deed of trust that his acts bind the latter."

In a recent decision of the Circuit Court of Appeals for the Second Circuit, in **In re Allied Owners Corporation**, 7 F. (2d) 201, 97 A. L. R. 360 (1934), in which a trustee was held not to have the power under a trust mortgage to bind the majority of bondholders against their will in a reorganization proceeding, the court used the following language:

"The powers and duties of this trustee are measured by the terms of the indenture of mortgage and we must look to that instrument for all the authority of the trustee. **Colorado and Southern Railway Company v. Blair**, 214 N. Y. 497, 108 N. E. 840. * * * In order to make the acts of the trustee binding on the bondholders, the trust deed or mortgage by its terms must show that the trustee was authorized to represent the bondholders, for the trustee has no power or authority to compel the bondholders to make a new and different contract, nor has it the power to discharge or compromise the security which it holds as trustee. **Clark v. St. L. A. & T. H. R. R. Co.**, 5 How. Prac. (N. Y.) 21; **Miller v. Rutland & W. Ry. Co.**, 36 Vt. 452; **Thompson on Corporations** (2d Ed. Sec. 2593. * * *

"Cases holding that, when a trust deed is sufficiently explicit, the trustee may file a proof of claim thereon in a bankruptcy proceeding on behalf of a

bondholders [In re Paramount Publix Corp. (C. C. A.), 72 Fed. (2d) 219; In re United Cigar Stores Co., 68 F. (2d) 895 (C. C. A. 2)], do not imply that a trustee thereby has an independent status as a creditor empowering him to decide whether to accept a smaller amount or extend the time of payment. * * * The creditors' beneficial interests are not to be impaired by a trustee exercising such power unless it clearly appears that such power has been given. * * *

* * * The trustee's judgment must not be substituted for that of the real creditors. * * *

The above principles were approved by the Circuit Court of Appeals for the Eighth Circuit in **Bitker v. Hotel Duluth Company** (1936), supra. See, also, **Gerdes on Corporate Reorganization**, Sec. 744, page 1202, and Sec. 1124, page 1783; **In re Prudence Co., Inc.** (D. C. N. Y.), 22 F. Supp. 264; **Martin v. Rockford Trust Company**, 281 Ill. App. 441 (1936), and **Rathje v. Serb**, 287 Ill. App. 142 (1936), 4 N. E. (2d) 750.

The case of **Brooks & Co. v. North Carolina Public Service Co.**, 32 F. (2d) 800, closely approaches this case. An action was brought by a bondholder against a corporation to recover damages for the failure of the corporation to permit a conversion of the bonds into stock as authorized by the bonds. One of the defenses was that the claim should be asserted through the trustee of the indenture securing the bonds. This defense was overruled by the court and it was pointed out that the right to elect the method of performance was in the holder of the bonds and not in the trustee. It was said at page 802:

"The refusal of the corporation to make the conversion at the demand of a bondholder creates in its favor a right of action which does not affect the other bondholders as a class, and it is a right which it may assert without the necessity of resorting to the trustee as an intermediary. The usual requirement for the trustee

thought of making the trustee a fiduciary for the bondholders for all purposes. To the contrary, the rights, duties and powers of the trustee are rigidly prescribed. For some purposes it represents the debtor corporation; for other purposes it represents the bondholders. Singularly, the Guaranty Trust Company of New York, which seeks without authority to demand payment in guilders for the bondholders, had been expressly designated as the paying agent for the Debtor. This emphasizes the untenable position of the petitioner: although an agent of the Debtor, it attempts to force upon the Debtor the unexpressed "will" of the bondholders. Petitioner sought below to support its "right" to make election as trustee of the indenture by reference to the line of cases represented by **In re Paramount Publix Corporation**, 72 F. (2d) 219, and **In re International Match Corporation**, 3 F. Supp. 445. The holding of these cases is that where, in addition to the promises contained in the bonds, there is a promise to pay the bonded indebtedness to the trustee contained in the indenture securing the bonds, it is permissible for the trustee to file a proof of claim in bankruptcy for the entire indebtedness and to receive dividends thereon. These holdings are not directly applicable to a Section 77 proceeding, because as pointed out, Paragraph (c) (7) of Section 77 expressly authorizes a mortgage trustee to file a claim for the entire issue. Nor do these cases bear upon the question as to the proper party to make an election. As pointed out in **In re International Match Corporation**, supra, though there are several promises, there is but one debt. The election to transform such indebtedness from a dollar indebtedness to a foreign money indebtedness in respect to any particular bond must reside at one time in one person only, since there can be but a single election. The bond and indenture specifically provide that the person to make an election is the bondholder. The supplemental promise in the indenture to the trustee is in respect to the payment of the in-

debtedness owing to the bondholders upon the elections to be made by the bondholders.

There is a great deal of discussion, judicial and otherwise, in respect to the limits of responsibility of the trustee of the modern deed of trust. Posner, "**Liability of the Trustee Under the Corporate Mortgage Indenture**," 42 Harvard Law Review 198; Posner, "**The Trustee of the Trust Indenture**," 46 Yale Law Journal 737; McCollum, "**The Securities and Exchange Commission and Corporate Trustees**," 36 Columbia Law Review 1197; Note, 33 Columbia Law Review 97. The law in New York was summarized in **Hazzard v. Chase National Bank**, 159 Misc. 57, 287 N. Y. Supp. 541, 566 (1936), as follows:

"Irrespective of holdings or tendencies in other jurisdictions, it is now the well-settled doctrine of this state that so long as the trustee does not step beyond the provisions of the indenture itself, its liability is measured, not by the ordinary relationship of trustee and cestui, but by the expressed agreement between the trustee and the obligor of the trust mortgage. Where the terms of the indenture are clear, no obligations or duties in conflict with them will be implied."

Years before, a similar statement was made by Mr. Justice Brewer, sitting in the Circuit Court for the Western District of Missouri, in **National Waterworks Co. v. Kansas City**, 78 F. 428, 434:

"It must be borne in mind that the trustee was selected and the terms of the trust prescribed by the mortgagor alone, and that, until after the bonds were negotiated, it was acting only as the latter's agent. It is true that, after the purchase of the bonds, the bondholders look to the trustee for the discharge of certain duties, but only such duties as it has promised to perform; and, to the extent that those duties inure to their benefit, they may properly hold it liable for any default therein. If, by the terms of a mortgage,

mortgage trustee could obtain title to the debt, the amount of the debt must be determined by an exercise of the foreign money option **by the bondholders.**

The trust company stated that it could not exercise the right granted by statute (to file a blanket claim) unless it also had the power to elect. In fact, it stated below that such power flows from the statute, and in support of this view it quoted that portion of the statute which specifically prevents the trustee from representing the bondholders for the purposes of accepting or rejecting a plan of reorganization. Obviously, this limitation has the opposite effect. The exercise of the guildler option might seriously affect a plan and the position of these bondholders in connection therewith. The exercise of the option is as much a matter of discretion as is the acceptance or rejection of a plan, and since the guildler issue has been injected into all plans of reorganization filed with the Interstate Commerce Commission it is inextricably associated with any plan. It is just as essential that the bondholders be allowed to exercise the rights given to them by the mortgage as it is that they be allowed to exercise their own discretion in regard to a plan of reorganization. There is nothing inconsistent in allowing the mortgage trustee to perform the mechanical act of filing a blanket claim, but reserving all personal rights, including the exercise of the option, to the bondholders.

In its effort to find some ground on which to base its action in attempting to take over the rights and powers of the bondholders, the mortgage trustee has misinterpreted the plain meaning of paragraph (c) (7) of Section 77 (which allows mortgage trustees to file blanket claims). Petitioner has construed this paragraph to constitute a prohibition against the filing of claims by the bondholders. We submit that no such construction of the statute can stand. The statute says that if a mortgage trustee files a

claim in behalf of all the bonds, "it shall be unnecessary for the holders * * * to file claims in their own behalf." Merely because something is unnecessary does not mean that it is prohibited. In this proceeding many individual bondholders have filed proofs of claim, as they were allowed to do (R. 168). This illustrates the lack of merit in petitioner's position.

Although the statute authorizes mortgage trustees to file blanket proofs of claim for the bondholders, it does not give authority to create rights or to select positions or to exercise options in behalf of the bondholders. The Circuit Court of Appeals for the Eighth Circuit has held that in the absence of this statutory authority, a mortgage trustee would not have a right even to file a claim for the bondholders. It said in the **Blumgart** case, *supra*:

"Except for the above statutory permission,* the trustee could not file claims for the bonds."

To the same effect see **Fitkin v. Century Oil Co.**, 16 F. (2d) 22 (C. C. A. 2d, 1916).

Petitioner's position on the right of election was summarized in its brief in the District Court in the following language:

"The proper interpretation of Section (c) (7) of Section 77 is that the Trustee, who is thereby given the right to file such proof of claim, must also have the right and the power to do everything essential to bring that claim to fruition by judicial allowance, which includes, of course, the exercise of the multiple currency option. Otherwise, there is no meaning to the provision that upon the filing of such proof of claim by the Trustee 'it shall be unnecessary for the holders of such bonds or securities to file claims in their own behalf.'"

*That part of Section 77 which is involved here.

This argument is meaningless. The bondholders are the judges as to what constitutes "the full measure of their rights." These rights may be fully protected by the action by the bondholders allowed by the mortgage. Nothing will be added thereto by transferring the rights to the mortgage trustee. The bondholders might have exercised their rights of election without filing claims. Therefore, there is no reason for attempting to broaden the limited authority given to the mortgage trustee by the statute. The exercise of an option in a mortgage and the filing of a claim are not the same thing. These acts may and in ordinary course will be done separately. They must be done separately where the claim is filed by the mortgage trustee. Neither Order No. 81 of the District Court (R. 193), nor paragraph (c) (7) of Section 77, on which that order was based, contemplated that an attempted exercise of the guilder option should be made in proofs of claim. On the other hand, they do not prevent such an attempted election in proofs of claim filed by bondholders, for the right of election, if valid, was in the bondholders. **The right of the mortgage trustee, however, is limited by the statutory language—it is only a right to file a claim.** See the **Blumgart** case, *supra*.

Petitioner concluded that if its election was invalid, no election will be made unless the owners act for themselves. This is true and in the absence of such an election the bonds will be payable in dollars. But this is no "sorry trap for the bondholders." It is not true that such a construction runs counter to the object of Section 77 to promote expedition of reorganizations. **Section 77 did not alter or undertake to alter the substantive rights of creditors, and the statutory procedural right given to mortgage trustees to file claims does not carry with it a deprivation of personal rights of bondholders.** Section 77 speaks for itself and we have searched it in vain for any statement

that mortgage trustees are to be vested with all rights and title given by the trust indentures to the bondholders.

The Circuit Court of Appeals for the Eighth Circuit clearly stated the meaning of the statute in the **Blumgart** case and under that decision, we submit, there can be no conclusion but that petitioner distinctly does not have the right to make the guilder election. Since neither the mortgage nor the statute gives such right to the petitioner, its alleged right to make the guilder election has been grasped out of thin air. It **may** file a blanket claim, but it **may not** make an election. In light of this decision, the authorities cited below by petitioner are entirely irrelevant. Furthermore, the cases cited by petitioner were not concerned with Section 77, whereas in the **Blumgart** case the court below construed the very portion of the very statute in question.

Other attempts were made by petitioner to justify its so-called right of election. It said that the trust relationship itself gives the trustee a right to elect. The reason for this, it said, is that the election of guilders was to the advantage of the bondholders. If this reasoning be adopted, we assume that if this Court should uphold the guilder claim as of the effective date of the reorganization plan, and if at that time the guilder had dropped in value so that a claim based on guilders would not be to the advantage of the bondholders, petitioner would conceive it to be its duty to renounce its alleged right to make an election, or to assert that by reason of the changed conditions some new right would spring into being, whereby the "election" could be recalled and another currency could be selected.* The argument that the trustee has rights to fit the advantages to be gained is too far-fetched to merit consideration.

The modern corporate trust deed is not drawn with the

*Petitioner's purported election followed the accelerated maturity of the bonds by nearly five months. It is to be assumed, therefore, that petitioner believes that the election might be made several years after maturity.

In corporate reorganization proceedings there is no basis whatever for the argument that the claim must be determined upon the basis of the facts existing on or prior to the date of the reorganization petition.

(2) Although the discussion may be academic in this case concerning a corporate reorganization, we cannot concede that petitioner viewed correctly the rule applicable in ordinary bankruptcy proceedings. The view that to be provable in ordinary bankruptcy a claim must not be contingent at the time of filing of the petition in bankruptcy, or that the amount must be ascertainable upon facts existing at that time, is not to be accepted without qualification, since the decisions of this Court in **Maynard v. Elliott**, 233 U. S. 273, and **Brown v. O'Keefe**, 300 U. S. 598. Professor Williston, commenting on these decisions, 6 **Williston Contracts** (Rev. Ed.), Section 1993, page 5595, says:

"These decisions and the language of the opinions in them make it evident that such previous decisions of lower Federal courts or State courts as are based on the assumption that contingent debts as such are not provable must be regarded as overruled."

Although this Court has refrained from generalizing, we take it from the above cases that a contract claim may be provable in bankruptcy if uncertainties in respect thereto are dispelled during the course of administration of the bankrupt estate so that the allowance thereof will not hold up the distribution of assets to creditors. An interesting discussion is contained in the article, "**Contingent Claims in Bankruptcy**," 6 *Fordham Law Review* 18, 31 (January, 1937).

When we come to determining the amount due by a bankrupt upon the breach of a unilateral executory contract, we see no reason why the ordinary rules of damages should not apply, even though they call for ascertainment

of values subsequent to the date of the filing of the bankruptcy petition. Even where the **status** of claims is determined on the date of the bankruptcy petition, the **amount** of the claims is to be determined upon the basis of the contract. The contract time of performance is not arbitrarily to be the date of the filing of the petition. Damages for a breach of a contract are to be determined in bankruptcy upon the ordinary principles of damages existing in other cases. **In re Carrier**, 21 F. (2d) 589 (Dist. Ct., Mass.); **Collier on Bankruptcy** (13th Ed.), p. 1419. In **6 Williston, Contracts** (Rev. Ed.), Section 1987, page 5589, it is observed:

“The amount of damages provable presents no different question in bankruptcy than that which arises when an action is brought against a solvent defendant on an anticipatory breach. The problem has been previously discussed. Facts subsequent to the bankruptcy should clearly be admitted as an aid to fixing the true value of the claim at the time when the petition was filed.”

In the case of contracts for the sale of real and personal property other than foreign moneys, the measure of damages is usually the difference between the market price and the contract price at the time of performance. It would seem obvious that where the contract time of performance is prior to the petition in bankruptcy, such date would be controlling, and not the date of the filing of the petition. A like result follows where the time of performance set by the contract is subsequent to the filing of the petition in bankruptcy. This was held in **In re Marshall's Garage**, 63 F. (2d) 759 (C. C. A. 2). In that case a claim was filed for damages for breach of the bankrupt's agreement to purchase real property on October 9, 1936. The adjudication in bankruptcy was made on January 4, 1930. The district court allowed a claim based on the value of the real

plan of reorganization. It is provisional, because proceeding will be discontinued if reorganization is accomplished. If so, ordinary bankruptcy, mortgage foreclosure, or an equity receivership may ensue to accomplish the liquidation which the reorganization proceeding fails to avert. The date of the petition in reorganization does not constitute a deadline or fixation point and does not have the significance that it has in ordinary bankruptcy. Finletter, in his text on **Corporate Reorganizations**, states at page 267: "The date of the filing of the petition is of no importance in determining the provability of claims under the reorganization sections; it is the date of consummation of the plan which assumes significance." The Eighth Circuit Court of Appeals in **Lowden v. Northwestern National Bank & Trust Co.**, 84 F. (2d) 847, certiorari denied, 299 U. S. 583, expressed its views as follows:

"From this opinion of the Supreme Court we gather that the mere filing of the petition for reorganization by the Rock Island, which in no sense constituted an admission of insolvency, gave to the bank no right of set-off, and that, for that purpose, it could not regard the petition, under the circumstances, as equivalent of a voluntary petition in bankruptcy. For the purpose of set-off, it would not be consistent with the provisions of section 77 to treat a debtor in reorganization proceedings as a voluntary bankrupt unless it appeared that insolvency actually existed. That liquidation and distribution of assets, rather than reorganization and rehabilitation, was in order."

Thus contingent claims may be proved in reorganization proceedings, although they have not matured upon the filing of petition, even though they could not be proved in ordinary bankruptcy. **City Bank Co. v. Irving Trust Co.**, 299 U. S. 433, 440. The rule in this respect

akin to the rule in equity receiverships as pronounced in **Wm. Filene's Sons Co. v. Weed**, 245 U. S. 597, 601, 602. The reorganization statute itself makes clear that all kinds of claims, whether in existence at the time of filing petition in reorganization or not, shall be provable. Title 11, U. S. C. A., Section 205 (b), provides:

“The term ‘claims’ includes debts, whether liquidated or unliquidated, securities (other than stock and option warrants to subscribe to stock), liens, or other interests of whatever character.”

This provision, making clear that in reorganization proceedings consideration must be given to claims of all kinds, whether provable in ordinary bankruptcy or not, and whether contingent, unliquidated, or uncertain in amount when the petition in reorganization was filed, controls the general provision, 11 U. S. C. A., Section 205 (l), that the statutes applicable to ordinary bankruptcy should control in reorganization proceedings where consistent therewith. See **Connecticut Railway & Lighting Co. v. Palmer et al.**, U. S. Sup. Ct., decided January 3, 1939. Interest may be allowed after the date of the petition in reorganization where claims are secured. **Gerdes, Corporate Reorganizations**, Section 631; cf. **Ticonic Bank v. Sprague**, 303 U. S. 406, 413. Facts arising after the petition in reorganization are constantly being taken into account in reorganization proceedings to determine the quantum of claims. **Connecticut Railway and Lighting Co. v. Palmer et al.**, supra; **Hippodrome Bldg. Co. v. Irving Trust Co.**, 91 F. (2d) 753 (C. C. A. 2), certiorari denied, 302 U. S. 748; **In re Paramount Publix Corporation**, 85 F. (2d) 42, 45 (C. C. A. 2), certiorari denied, 300 U. S. 655. In the last-cited case the Court said:

“In actions upon anticipatory breaches the court does not shut its eyes to what has passed since the breach, or confine itself to the half lights which alone were originally available.”

The order allowing or rejecting the claim is a judgment under Title 11, U. S. C. A., Section 48 (Section 25 of the Bankruptcy Act), provides for appeals "from a judgment allowing or rejecting a debt or claim of \$500 or over." The order allowing or rejecting the claim is the judgment, and any order short thereof in respect to the claim is not such a judgment. **J. W. Calnan Co. v. Doherty**, 224 U. S. 145; **Duryea Power Co. v. Sternbergh**, 218 U. S. 299, 300. Section 25 of the Bankruptcy Act is one of the portions of the old bankruptcy laws which apply to Section 77 cases. **Meyer v. Kenmore Hotel Co.**, 297 U. S. 160.

The judgment of the Court allowing a claim originally made in terms of guilders (R. 5) is the first occasion on which the Court to express the claim in terms of dollars. Under the principles discussed, it should take the guilder at its value on the date it is necessary to translate the guilder claim into dollars. We believe that the value of the guilder as of the date of the judgment allowing the claim should control in ordinary bankruptcy proceedings. It may also control in reorganization proceedings, and the Court originally took that view (R. 111):

However, there is a possibility of error in applying the general principles too literally to corporate reorganization proceedings without giving due weight to the peculiar purposes of such proceedings, as this Court has pointed out in **Lowden v. Northwestern National Bank**, 298 U. S. 160.

The purpose of a proceeding under Section 77 is to effect a plan of reorganization. **Continental Bank v. Rock Island Ry. Co.**, 294 U. S. 648, 676. The proceedings prior to the acceptance of a plan of reorganization and its confirmation by the court are provisional, for the whole proceeding will be dismissed if a plan is not confirmed within a reasonable time. This Court said in **Lowden v. Northwestern National Bank**, *supra*, l. c. 163, 164:

"A proceeding to reorganize is not a bankruptcy, though an amendment to the bankruptcy act creates and regulates the remedy. From the fact without more that such a proceeding has been initiated, one cannot know that it will be necessary to have recourse to Section 68, which was meant in its enactment to prescribe the rule of set-off upon a distribution of the assets. That stage of administration, or the analogous stage of a revision of the debts, may never be attained in a proceeding to reorganize, though a petition has been approved and trustees have been appointed. If a plan of reorganization is not proposed or accepted, or, being proposed and accepted, is not confirmed by the court within a reasonable time, the whole proceeding may be dismissed, Section 77 (c) (7), the title to the estate thus reverting to the debtor. By that time there may even be ability to pay demands as they mature. What is done at the beginning amounts to little more than a provisional sequestration to give protection for the future."

Thus an order allowing a claim in a Section 77 proceeding is for the purpose of providing a measure for the securities or other assets to be distributed upon the confirmation of a plan of reorganization. The final step, which fixes what the claimant against a railroad is to secure is the confirmation by the court of the plan of reorganization. All preceding steps in the reorganization, including the allowance of claims, are both preliminary and provisional. Realistically, therefore, it is the order confirming the plan of reorganization which determines what the guildler claimants of the St. Louis Southwestern Railway Company will receive in dollars or dollar securities for their guildler claims in the event this Court should rule that such claims are valid. The judgment-date rule requires foreign moneys to be valued as of the date that the demand therefor is translated by judgment of an American court into United States money. There is force in the position that this

is not done prior to the order confirming the reorganization plan and that it is done by that order. If so, the value of the guilder on the date of the plan of reorganization should be under control.

This would afford an equitable solution (subject to the underlying inequity of enforcing the guilder claim). The petitioner has asserted a claim for guilders (R. 5) based upon bonds containing an option for guilders which it sought to exercise. We see no reason why the right of the First Terminal and Unifying bondholders, who have elected guilders (or who have had guilders elected for them), could not be fully preserved by providing in the reorganization plan that securities payable in guilders should be issued to such bondholders. No such provision for these bondholders has been proposed because it is manifestly contrary to the public interest to inject into the capital structure of a reorganized American railroad the uncertainties of a foreign money debt. Approval of the Interstate Commerce Commission therefore could not be anticipated. Because of this consideration of the public interest, the bondholders may be tendered securities in the reorganization plan, in lieu of securities payable in guilders, if their right to guilders is upheld, expressed in American money of a value equal to the guilders called for under the guilder options of the First Terminal and Unifying Bonds. It is the confirmation of the plan of reorganization that causes the petitioner's prior demand for guilders to be transposed into a dollar security, and there can be no reasonable complaint on that score if the dollar value of the new securities measure the value of the guilders called for by the old securities at the time the exchange is made certain by the order of the court confirming the reorganization plan. Nor is there any procedural difficulty. It is not necessary in a Section 77 proceeding that all rights be allowed in terms of dollars as it is in ordinary bankruptcy.

cies looking solely to liquidation. For instance, executory contracts may be adopted by the reorganized company. **Consolidated Gas, Electric L. & P. Co. v. United Railways & Electric Co.**, 85 F. (2d) 799, 805 (C. C. A. 4th), certiorari denied 300 U. S. 663. The petitioner filed its claim for guilders, and an order may properly be made, if the claim therefor is good, allowing it for the guilders demanded, to be valued in the reorganization proceeding at the value of the guilder upon the date of the order of confirmation.

What we are seeking is the true judgment date within the principles of **Deutsche Bank v. Humphrey**, supra, in a Section 77 reorganization proceeding. Manifestly it is either the date of the judgment allowing the claim or the date of the order confirming the plan of reorganization. So far as the respondents can now judge, it does not make any great difference to them financially which date is adopted. The considerations stated above incline us to the view that the date of the order of confirmation is the true judgment date in a reorganization proceeding.

C. The Contention of the Petitioner That the Value of the Guilder Should be Taken at the Date of the Filing of the Petition in Reorganization May Not Be Accepted Because (1) Based Upon Cases Concerned with Ordinary Bankruptcies or Insolvency Proceedings Where the Petition Date Is Given a Significance Lacking in a Section 77 Proceeding; (2) Not Supported in Fact by the Cases Cited Even in Ordinary Bankruptcies or Receiverships; and (3) Impracticable of Operation Upon the Particular Facts of This Case.

(1) We have developed, supra, page 120, the difference between reorganization proceedings under Section 77 and ordinary bankruptcies looking toward liquidation.

The filing of the petition in reorganization in a Section 77 proceeding is one step looking toward consummation of a

in **Tillman v. Russo-Asiatic Bank**, supra, at page 1025, as follows:

“Where a debt is due in a foreign country payable in the currency of that country, and suit is brought on it in the United States, the Supreme Court has held the plaintiff should recover what that currency is worth in this country on the day of judgment.”

The opinion of the Supreme Court in **Deutsche Bank v. Humphrey**, supra, made reference to the value of the foreign money at the time of bringing suit, but this was evidently an inadvertence and judgment was entered at the rate of exchange fixed as of the judgment date. See **Royal Insurance Co. v. Compania Transatlantica Espanola**, supra, and **Indian Refining Co. v. Valvoline Oil Co.** supra.

Deutsche Bank v. Humphrey, supra, adopting the judgment-date rule, was a proceeding in equity, but the rule has been followed as a substantive principle of law at law and in admiralty.

Petitioner did not seriously dispute the general application of the judgment-date rule. It cited below certain authorities as supporting the performance-date rule, under which foreign moneys are valued as of the date of the time of performance instead of the judgment date in an action in this country. As pointed out above, **Hicks v. Guinness**, supra, decided in 1925, is confined in its application to cases where the place of payment of foreign moneys was in the United States, as is made clear by the subsequent Supreme Court decisions, particularly **Deutsche Bank v. Humphrey**, supra. This distinction is based upon principle, since where there is an agreement to deliver foreign moneys in the United States the parties are dealing with foreign moneys as a commodity, and the same measure of damages can well be applied for the breach of such a contract as is applied in the case of a breach of contract.

for the sale of commodities generally. Where, however, the agreement is to pay guilders in Holland or pounds in England, the claim is in terms of the money of the country of performance, and guilders or pounds will satisfy such a claim in such foreign country. It is not until suit is brought in this country that it becomes necessary to express the claim in the money of this country, since in such an action judgment may only be in terms of dollars. Certain English and state courts have entertained different views, but the rule announced by this Court has received endorsement in the **Restatement, Conflict of Laws**, 1934, Section 424. There are no Missouri decisions dealing with the subject. As is made clear by the **Restatement**, the question is determined by the law of the jurisdiction rendering the judgment. See **Beale, Conflict of Laws**, Sections 424.1, 424.2.

B. Applying the Judgment-Date Rule to This Section 77 Reorganization Proceeding of a Railroad, the Guilder Should be Taken at Either Its Face Value Upon the Date of the Judgment Allowing the Claim or Upon the Date of the Order Confirming the Plan of Reorganization.

A literal application of the judgment-date rule in a Section 77 reorganization proceeding fixes the time for the valuation of the guilder as of the date of the judgment allowing the claim. The filing of a proof of claim is not equivalent to the allowance of that claim. Title 11, U. S. C. A., Section 93 (d), provides:

“Claims which have been duly proved shall be allowed, upon receipt by or upon presentation to the court, unless objection to their allowance shall be made by parties in interest, or their consideration be continued for cause by the court upon its own motion.”

election. It is asking for \$1,687.72 per bond, which, of course, is \$687.72 in excess of the dollar amount thereof. Moreover, since the value of the guilder was \$.5560 on the date of the stipulation, this sum (\$1,687.72), would purchase on that date 3,035 guilders, which is 545 more guilders than called for by the guilder option. Thus a claim for \$1,000.00 or 2,490 guilders has grown in the hands of petitioner's skillful counsel to a claim for \$1,687.72, or 3,035 guilders. Such a startling result is avoided by the application of the judgment-date rule.

A. In a Proceeding in This Country to Recover Upon a Contract to Pay Foreign Moneys in a Foreign Country, the Value of the Foreign Moneys Is Determined as of the Date of the Judgment.

The optional provision of the Debtor St. Louis Southwestern Railway Company's First Terminal and Unifying Bonds sought to be exercised by the petitioner, if valid, conferred the right to receive guilders in Amsterdam, Holland, and nowhere else (R. 19). The petitioner is seeking to enforce a promise of the Debtor to pay guilders in Holland, upon demand therefor in that country.

In determining the amount of a judgment to be rendered in this country in our money upon a claim for foreign moneys, this Court has adopted the judgment-date rule, i. e., wherever the place for payment is abroad, the amount of the claim for foreign moneys is computed at the value of the foreign money at the time of judgment, when it becomes necessary to translate the claim into terms of our money. The reason for adopting this latter rule is that if the holder of a contract for the payment of foreign money sued in a foreign country he could recover only a judgment for the foreign money, and if he sues in this country he should recover neither more nor less than the worth of the foreign money when payment is enforced by the entry of

judgment. If the judgment-date rule is not applied—the value of the guilder having fallen—a foreigner to whom guilders were promised could secure a judgment of greater value in this country than he could if he sued in the country where performance was due.

In **Deutsche Bank v. Humphrey**, 272 U. S. 517, this Court adopted the judgment-date rule as applicable where a contract called for the payment of foreign moneys in a foreign country. It distinguished its previous decision, **Hicks v. Guinness**, 269 U. S. 71, where the performance-date rule was applied, and confined the **Hicks** case to an action upon a contract for foreign moneys payable within the United States. That the judgment-date rule applies wherever the place of payment of foreign moneys was in a foreign country was again affirmed in **Zimmermann v. Sutherland**, 274 U. S. 253, 255. The Court said:

“The distinction between the **Deutsche Bank** case and **Hicks v. Guinness**, 269 U. S. 71, is not, as argued, that the plaintiff in **Hicks v. Guinness** was in the United States, but that, as the court understood the facts, the debt was payable in New York and subject to American law, so that upon a breach of the contract there arose a present liability in dollars.”

Since the decisions in these cases were announced the judgment-date rule has been applied uniformly by the federal courts. **Tillman v. Russo-Asiatic Bank** (C. C. A. 2d), 51 F. (2d) 1023 (law); **Royal Insurance Co. v. Compania Transatlantica Espanola** (Dist. Ct. N. Y.), 57 F. (2d) 288, 291 (admiralty); **Indian Refining Co. v. Valvoline Oil Co.** (C. C. A. 7th), 75 F. (2d) 797, 800 (law); **The West Arrow** (C. C. A. 2d), 80 F. (2d) 853, 858 (admiralty); **The Integritas** (Dist. Ct. Md.), 3 F. Supp. 891 (admiralty). See, also, 48 C. J. 606. For a discussion of these cases, see note at 105 A. L. R. 640. The federal rule was summed up

A consideration of the mortgage provisions and the Dutch language, in light of the decision in the *Blum* case, leads to only one conclusion: that the purpose of the guilders election by the mortgage trustee was wholly valid and ineffective. This point in itself is sufficient to support the conclusions of the lower courts, irrespective of the decision reached as to the effect of the Joint Reorganization.

III.

IF IT SHOULD BE DETERMINED THAT THE BONDS ARE PAYABLE IN GUILDERS, DAMAGES SHOULD BE BASED ON THE EXCHANGE VALUE OF THE GUILDER IN TERMS OF THE UNITED STATES DOLLAR AS OF THE JUDGMENT DATE. I. E., WHEN THE CLAIM FOR GUILDERS IS TRANSLATED BY THE ACTION OF THE REORGANIZATION COURT INTO DOLLARS.*

If it should be determined that the bonds are payable in guilders, the exchange value of the guilder in terms of the United States dollar should be fixed in accordance with the "judgment-date" rule followed by this Court. The application of this rule in a Section 77 reorganization proceeding is a matter of first impression. It seems that the controlling date is either the day of the order of the Court allowing the claim or the day of the order of the Court confirming the plan of reorganization.

If there were a rule, as petitioner contended below, which we deny, that in ordinary bankruptcy the claim must be valued as of the date of filing of the bankruptcy petition, it would be without significance in a reorganization proceeding. Moreover, it could not be applied u

*As explained *supra*, page 10, petitioner did not brief this point and the respondents deem it essential to present all points involved.

the particular facts of this case where the purported election to receive guilders was subsequent to the filing of the petition in reorganization.

The petitioner's alternative contention that the value of the guilder is to be determined as of the date of performance, which it varyingly fixes as the date of acceleration of maturity or the date of demand for guilders, may not be accepted under controlling decisions of this Court, the place of performance being abroad.

The facts may be summarized as follows:

The option sought to be exercised by petitioner is to receive guilders in Amsterdam, Holland. Petitioner is seeking to establish a claim based upon the high value of the guilder prevailing prior to September 27, 1936. When the bonds were issued in 1912 the guilder was worth \$4020, and 2,490 guilders were worth approximately \$1,000 (R. 140, 168). Petitioner, in computing its claim, used a value of \$.6778 for the guilder, which was stipulated to have prevailed on certain dates prior to September 27, 1936 (R. 164). After September 27, 1936, the guilder dropped in value, and on the date of the signing of the stipulation it was worth \$.5560 (R. 165). It is worth somewhat less today. Petitioner has sought to establish a claim for \$1,687,722 per thousand-dollar bond, but, even though all of its contentions should be accepted, if its claim^s is computed upon the value of the guilder on the date of the signing of the stipulation the claim would be limited to \$1,384.44 per thousand-dollar bond.

The inequity of applying any rule in this case other than the judgment-date rule would be gross. Each of the First Terminal and Unifying coupon bonds called for \$1,000.00 United States money, or, at the option of the holder, 2,490 guilders. Petitioner is seeking to have a claim established which will give it more than the value provided by either

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trict Court's 1937 summer recess had started. No claims could have been heard until the fall of 1937. This claim was one of the first matters set for hearing when the court resumed hearings after the summer recess, and it was the **first claim to be heard by the court in these proceedings** (R. 157). Petitioner's counsel are well aware of these facts and of the fact that the postponements of the hearing of this claim were **at their request**. The injunction was not against the filing of the claim (R. 136, 163), but against the acceleration of the maturity of the bonds, and the petitioner did file its claim pending that suit (R. 2, 127). The claim could have been brought to trial at any time, irrespective of the injunction against acceleration.

If the guilder claim should be allowed, the date upon which the claim of the petitioner for guilders is recognized in terms of dollars, whether that be regarded as the date of order allowing claim or the date of order confirming the reorganization plan, must control, under the applicable judgment-date rule, in ascertaining the amount to be allowed on account of the claim for guilders payable in Holland. If it should be argued that the judgment-date rule is inapplicable because this is a proceeding under a new statute, then our answer is that equitable principles must govern. No court has said what date governs in fixing the measure of damages on claims for foreign moneys in Section 77 proceedings. We urge that because of the very nature of the proceedings, the rate of exchange as of the judgment date (effective date of the reorganization) is the only proper rate to apply.

CONCLUSION.

This Court should approve the finding of the Circuit Court of Appeals that these bonds and coupons are now payable in foreign moneys, and that the claim may be allowed only to the extent of the United States dollar

amount of the bonds, on the basis of the Joint Resolution of Congress of June 5, 1933. We submit that the opinion of the Circuit Court of Appeals should be affirmed.

In addition, the claim should be allowed only in said dollar amount because, even if the option clause should be held to be valid, petitioner had no power to make the purported election for the bondholders. Furthermore, if any recognition is to be given to the guilden claim, the amount should be governed by the exchange rate as of the date of confirmation of the plan of reorganization or date of the order allowing the claim, and not as of any other date.

In conclusion, we wish to summarize our principal contention—that the bonds are payable, dollar for dollar, in legal tender of the United States, for the reason that the foreign money option clause was made unenforceable by the Joint Resolution of Congress of June 5, 1933—for if the Circuit Court of Appeals' decision is affirmed it will be unnecessary to decide the points contained in the other contentions discussed above. **It is unthinkable that the Congress, acutely cognizant of the overwhelming pressure of the debt structure of this country and of the miseries and maladjustments entailed by the greatest deflation of our time, seeking to alleviate the situation so that means might be found to liquidate debts and thus save debtor and creditor alike, should consciously adopt monetary legislation which would, in effect, require debtors situated as is the respondent Debtor, to pay a premium of 70 per cent on account of their indebtedness. Yet this is the result which petitioner invites the Court to reach. The opposite, we believe, was the Congressional intent, as evidenced by its monetary legislation. There is no obstacle in the path of this Court to make such legislative intention effective, since this Court has sustained the constitutionality of the Congressional Resolution.**

The opinion and decree of the Circuit Court of Appeals should be affirmed.

Because the position of the Debtor in this matter is identical to that taken by the trustee, no separate brief is being filed on behalf of the Debtor.

Respectfully submitted,

A. H. KISKADDON,
CARLETON S. HADLEY,
Counsel for Berryman Henwood, Trustee,
St. Louis Southwestern Railway
Company, Debtor, Respondent.

Dated at St. Louis, Missouri,
January 28, 1939.

APPENDIX A.

THE JOINT RESOLUTION OF JUNE 5, 1933.

(48 Stat. 112, Public Resolution—No. 10
73d Congress, H. J. Res. 192.)

"Joint Resolution

To assure uniform value to the coins and currencies
of the United States.

Whereas the holding of or dealing in gold affect the public interest, and are therefore subject to proper regulation and restriction; and

Whereas the existing emergency has disclosed that provisions of obligations which purport to give the obligee a right to require payment in gold or a particular kind of coin or currency of the United States, or in an amount in money of the United States measured thereby, obstruct the power of the Congress to regulate the value of the money of the United States, and are inconsistent with the declared policy of the Congress to maintain at all times the equal power of every dollar, coined or issued by the United States, in the markets and in the payment of debts. Now, therefore, be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) every provision contained in or made with respect to any obligation which purports to give the obligee a right to require payment in gold or a particular kind of coin or currency, or in an amount in money of the United States measured thereby, is declared to be against public policy; and no such provision shall be contained in or made with respect to any obligation hereafter incurred. Every obligation, heretofore or hereafter incurred, whether or not

suggested why that measure of damages should be changed by the filing of a petition in bankruptcy or reorganization.

The arguments of convenience made below by petitioner are not convincing. They have no greater point in a bankruptcy proceeding than in any other court proceeding, and this Court considered them, but did not yield thereto, in **Deutsche Bank v. Humphrey**, *supra*. No more forceful statement thereof can be made than was made by Mr. Justice Sutherland in his dissenting opinion in that case. A claim in bankruptcy may be tried as readily and as expeditiously as a claim for damages against a solvent corporation, and there is no more opportunity for jockeying for time in such a proceeding than in usual litigation—perhaps less.

(3) Under the particular facts of this case the rights of the parties could not be determined as of the date of the filing of the petition in reorganization. Petitioner cannot consistently insist upon the value of the guilder being determined upon the date of the reorganization petition and at the same time rely upon an election to receive guilders and an acceleration of maturity, made thereafter.

The practical application of the rule, as claimed by petitioner in this case, would mean that petitioner had no claim for guilders at all and that its claim therefor would have to be disallowed. The Debtor's petition under amendatory Section 77 of the Bankruptcy Act was filed on December 12, 1935. The earliest date on which petitioner's purported election to receive guilders occurred was September 24, 1936, when demand for guilders was attempted in Holland (R. 165, 169). If the rights of the petitioner congealed on December 12, 1935, there would be no claim for guilders, as there had been no election for guilders on that date. Another practical application of the rule urged by petitioner in this case is that the acceleration of the maturity of the bonds as of May 5, 1936 (after the filing

of the petition in reorganization), was meaningless, since the petitioner's rights were definitely fixed upon the date of the petition.*

Petitioner insisted that the railway Trustee is estopped from maintaining that the date of allowance of the claim is the proper date, because of the existence of an injunction against obtaining judgments against the Debtor. In this argument petitioner complained of the necessary results of trusteeship. It is unfortunate that reorganization became necessary, but we are facing facts and not what might have been had it not been for the trusteeship. The law sanctions the injunction against judgments and one of the consequences is the effect upon the bondholders. Petitioner's complaint against the injunction order (No. 1) amounts to a plea that petitioner be treated just as though the trusteeship had never existed. The injunction, which was unquestionably valid, is no excuse for changing the law as to the proper date for fixing the guilder value. The petitioner had as good an opportunity to file its claim and have it allowed as it would have had to get judgment if it had brought a suit for foreclosure and for an equity receiver.

Finally, petitioner cited the acceleration injunction and the alleged delay resulting therefrom as a reason for the non-applicability of the judgment-date rule. There has been no delay in the reorganization proceedings occasioned by the railway Trustee. The injunction proceeding did not delay the proceedings on this claim or the allowance thereof by a single day. The time for filing protests against proofs of claim did not expire until after the Dis-

*If the acceleration as of May 5, 1936, has any meaning at all, the selection of that date is another reason why the quantum of the claim cannot be fixed as of the bankruptcy date, for by petitioner's own act maturity was fixed at May 5, 1936, to the exclusion of all other dates. Under petitioner's theory the value of the claim must be fixed before the bonds become due. This cannot be done. Thus, if the acceleration has any meaning, its effect is to require the application of the judgment-date rule.

ther performance on his part. On principle it has no application to unilateral contracts such as we have here. **Restatement, Contracts**, Section 318. In **Smyth v. United States**, 302 U. S. 329, 356, a case involving the Joint Resolution, this Court observed:

“But the rule of law is settled that the doctrine of anticipatory breach has no general application to unilateral contracts; and particularly to such contracts for the payment of money only.”

It has been expressly ruled that the doctrine of anticipatory breach is without application to a unilateral contract for the payment of foreign moneys. **Benecke Haebler**, 38 App. Div. 344, 58 N. Y. Supp. 16, affirmed 1 N. Y. 631, 60 N. E. 1107. But even if the doctrine of anticipatory breach applied, as it does not, it is well settled that damages are not to be determined upon the basis of the market value of the commodity concerned on the date of such anticipatory breach, but, instead, upon the date of the time of performance. **Sedgwick, Damages**, 9th Ed., Section 636 (b); **Roehm v. Horst**, 178 U. S. 1; **United Press Association v. National Newspaper Association**, 237 F. 553 (C. C. A. 8); **Restatement, Contracts**, Section 338. The rule of the **Restatement** is: “The rules for determining damages recoverable for an anticipatory breach are the same as in the case of a breach at the time fixed for performance.” Clearly, therefore, whether the filing of a petition in bankruptcy is or is not an anticipatory breach, the rule of damages otherwise applicable (in this case the judgment-date rule) applies.

Although some of the cases cited below by petitioners upon the determination of damages in bankruptcy or receivership are confusing when first examined, a careful study reveals that without exception they support the view taken by the respondents that there is no peculiar rule

insolvency proceedings referring the determination of the measure of damages to the values existing on the date of the filing of a petition in bankruptcy or of adjudication, or the appointment of a receiver.

A case bearing upon the measure of damages, cited below by petitioner, is **Samuels v. E. F. Drew & Co.**, 292 F. 734 (C. C. A. 2). This case involved a contract by a corporation, later in receivership, to purchase cocoanut oil. The court did not apply a rule of damages unique to insolvency proceedings and did not hold that the commodity contracted to be purchased by the insolvent should be taken at its value on the date of the petition for a receiver in ascertaining the damages to be proved. To the contrary, treating the receivership as an anticipatory breach of the contract, it applied the rule of damages laid down by this Court in **Roehm v. Horst**, *supra*. Damages were (page 738 of the opinion)

“determined by taking the difference between the contract and market prices on the date of the breach for the same quality of goods, not for immediate delivery, but for delivery at the time and place specified in the contract. **Roehm v. Horst**, 178 U. S. 1, 20 Sup. Ct. 780, 44 L. Ed. 953.”

It will be noted that the damages were based upon the value of the commodities for delivery at the contract time of performance. As it appeared that on the date of the anticipatory breach there was a market for future deliveries of the commodity on the performance date, that value was taken rather than the value for spot delivery on the date of the anticipatory breach or on the contract date for performance.* This decision affirmed the lower court decision to the same effect, which is cited in petitioner's

*Petitioner did not establish the cost on the bankruptcy date of a contract for the future delivery of guilders on the maturity date. In respondents' view this did not constitute a failure of proof since the value of the guilder on the judgment date is controlling.

brief below as **Eldorado Oil Works**, 286 F. 278. In that case Judge Mack emphasizes:

“If, on the anticipatory breach, there be a present market price for the goods to be delivered in accordance with the original contract, that price controls, not the market price for immediate delivery either at the time of breach or at the time fixed in the contract for delivery.”

L. Hand, J., in **Callan v. Andrews**, 48 F. (2d) 118 (C. C. A. 2), and Professor Williston in his treatise on **Contracts** (Rev. Ed.), Sec. 1397, recognize the general rule that damages for anticipatory breach are computed on the same basis as damages for breach at the time of performance, referring to the **Drew** case as an exception to the general rule, to be applied only in a limited class of cases where there is proof of a present market for contracts for future delivery of the commodity involved. Judge Mack expressly said the rule he was applying was a special one, based on the duty to mitigate damages, and controlling whether the action was brought before or after the date of performance (286 F., at 279). Both Hand and Williston point out the impracticability of requiring the plaintiff as a general rule to anticipate the market and attempt to mitigate damages by making a new contract to replace the old. The other cases cited by petitioner are applications of the rule in the **Drew** case. The fuller statement of the rule is that stated in **In re Susquehanna Silk Mills**, 10 F. Supp. 787, 788 (Dist. Ct., N. Y.), likewise cited by petitioner, and which is as follows:

“The rule in equity receiverships is that where the receiver renounces an executory contract of the insolvent to purchase commodities customarily sold for future delivery, the measure of damages provable by the seller is the difference between the contract price and the price at which he could have sold the commodity at the time the receiver was appointed

for delivery as required by the contract. The leading case is *Samuels v. E. F. Drew & Co.*, 292 F. 734 (C. C. A. 2)."

The decision in *Samuels v. E. F. Drew & Co., Claim of Produce Brokers' Co.*, 286 F. 281 (Dist. Ct. N. Y.), referred to by petitioner, arose in the same proceeding as *Eldorado Oil Works*. When these cases are read together it will appear that Judge Mack applied the same rule in respect to the damages to be recovered upon a contract to deliver pounds sterling as in the case of the contract for cocoanut oil. In applying the same rule for damages in the case of foreign moneys as in the case of other commodities, Judge Mack followed the performance-date rule which was then the rule in the Second Circuit. See *Guinness v. Miller*, 299 F. 538 (C. C. A. 2), decided April 14, 1924.* For that matter, a performance-date rule may have been properly applied in that case under the present Supreme Court rule, as the place of performance seems to have been in the United States. As to *In re Banco Nacional Ultramarino*, 296 F. 882, another case arising from the E. F. Drew receivership, it does not appear that the performance date was different from the date of filing the petition for a receiver.

This review of the cases demonstrates that they have applied the rules of damages ordinarily applicable in the case of contracts, regarding bankruptcy or the appointment of a receiver as an anticipatory breach of the contract. The doctrine of anticipatory breach does not apply to unilateral contracts for the payment of money such as we have here, but, irrespective of that, it is now established that where the place of performance is abroad, the proper measure for judgment in a contract payable in foreign moneys is determined by the value of the foreign money at the date of judgment, and no reason can be

**Deutsche Bank v. Humphrey*, 272 U. S. 517, was not decided until 1926.

property on January 4, 1930. The Circuit Court of Appeals, in reversing the decision, said:

"The fact that an anticipatory repudiation is a breach of contract does not cause the repudiated promise to be treated as if it were a promise to render performance at the date of the repudiation . . . In the case at bar the damages which the lessor-vendee would suffer from nonperformance by the lessee-vendee at the appointed time is the difference between the market value of her land on October 9, 1936 (when she had contracted to convey, but would retain it) and the purchase price she was to receive under the contract."

In *In re Griffin Manufacturing Co.*, 43 F. (2d) 624 (D. C. Ga.), the court was concerned with the effect to be given to facts mitigating the damages of a contract claimant after the filing of the petition in bankruptcy. These facts were regarded as pertinent, the court saying, at page 628:

"In liquidating an anticipatory breach of contract the occurrences up to the time of trial may be proved and considered that throw light upon the damages really suffered."

Usually some estimate can be made by the bankruptcy court as to the value of the property at the future date of performance, in which case the claim is allowed. When, however, the value at such future time is entirely speculative, the claim must be disallowed. In *re Ray Long and Richard R. Smith*, 95 F. (2d) 525, 528 (C. C. A. 2). Where a claim is filed against a bankrupt estate upon a money debt, payable at some future time without interest, appropriate discount must be made so as to reduce the claim to its present value. In *re Marshall's Garage*, supra.

In the instant case there was on the date of the filing of the petition in reorganization an unmatured claim for the payment of moneys. The fact that the indebtedness

did not mature until 1952 would not have prevented a claim thereon being filed in the bankruptcy proceedings. **In re Buzzini & Co.**, 183 F. 827, 830 (Dist. Ct., N. Y.). It could be proved to the same extent as a matured claim. It becomes necessary in such a proceeding to translate the claim for guilders into terms of dollars as of a date certain. Since the place of performance is abroad, the expression of the claim for guilders in terms of dollars should be made as of the date when such translation is necessary under the judgment-date rule adopted by the United States Supreme Court. The **measure of recovery** in dollars on such claim must be determined by the ordinary rules for fixing damages in the full light of the facts existing at the trial, and not in the half lights available at the date of filing of a petition in bankruptcy.*

Petitioner urged below the use in determination of its claim of the value of the guilder upon the date of the filing of the petition on the theory of anticipatory breach. Bankruptcy will constitute an anticipatory breach of an executory contract to which the doctrine of anticipatory breach is applicable (**Central Trust Company of Illinois v. Chicago Auditorium Association**, 240 U. S. 581), but it has been held that the filing of a petition in reorganization will not. **Consolidated Gas, Electric L. & P. Co. v. United Railways & Electric Co.**, 85 F. (2d) 799, 805 (C. C. A. 4), certiorari denied, 300 U. S. 663.

The doctrine of anticipatory breach is justified in reference to bilateral contracts where the anticipatory breach by one party should exempt the innocent party from fur-

*If we should apply the performance-day rule, half-heartedly suggested by petitioner, and also apply the rule so strenuously urged that the status of this claim should be determined at the date of the filing of the petition in bankruptcy, it would follow that at the time of the filing of the bankruptcy petition the performance date (there being no acceleration at that time) was January 1, 1952. The rate of exchange upon the judgment date gives a better prediction of the value of the guilder on this 1952 maturity date than does the value of the guilder on the prior date of filing the petition in bankruptcy.

any such provision is contained therein or made with respect thereto, shall be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts. Any such provision contained in any law authorizing obligations to be issued by or under authority of the United States, is hereby repealed, but the repeal of any such provision shall not invalidate any other provision or authority contained in such law.

(b) As used in this resolution, the term 'obligation' means an obligation (including every obligation of and to the United States, excepting currency) payable in money of the United States; and the term 'coin or currency' means coin or currency of the United States, including Federal Reserve notes and circulating notes of Federal Reserve banks and national banking associations.

Sec. 2. The last sentence of paragraph (1) of subsection (b) of section 43 of the Act entitled 'An Act to relieve the existing national economic emergency by increasing agricultural purchasing power, to raise revenue for extraordinary expenses incurred by reason of such emergency, to provide emergency relief with respect to agricultural indebtedness, to provide for the orderly liquidation of joint-stock land banks, and for other purposes,' approved May 12, 1933, is amended to read as follows:

'All coins and currencies of the United States (including Federal Reserve notes and circulating notes of Federal Reserve banks and national banking associations) heretofore or hereafter coined or issued, shall be legal tender for all debts, public and private, public charges, taxes, duties, and dues, except that gold coins, when below the standard weight and limit of tolerance provided by law for the single piece, shall be legal tender only at valuation in proportion to their actual weight.'

Approved, June 5, 1933, 4:40 P. M."

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CHARLES E. HENLEY

IN THE
Supreme Court of the United States

OCTOBER TERM, 1938

No. 384

GUARANTY TRUST COMPANY OF NEW YORK, as
Trustee under St. Louis Southwestern Railway Com-
pany First Terminal and Unifying Mortgage dated
January 1, 1912,

Petitioner,

against

BERRYMAN HENWOOD, Trustee of St. Louis South-
western Railway Company, Debtor, ST. LOUIS
SOUTHWESTERN RAILWAY COMPANY, and
SOUTHERN PACIFIC COMPANY,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

**BRIEF FOR RESPONDENT SOUTHERN PACIFIC
COMPANY**

GEORGE L. BULAND,
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of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1938

GUARANTY TRUST COMPANY OF NEW
YORK, as Trustee under St. Louis
Southwestern Railway Company
First Terminal and Unifying Mort-
gage dated January 1, 1912,

Petitioner,

against

No. 384

BERRYMAN HENWOOD, Trustee of St.
Louis Southwestern Railway Com-
pany, Debtor, ST. LOUIS SOUTHWEST-
ERN RAILWAY COMPANY, and SOUTH-
ERN PACIFIC COMPANY,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

**BRIEF FOR RESPONDENT SOUTHERN PACIFIC
COMPANY**

Opinions Below

The District Court for the Eastern District of Missouri,
Eastern Division, wrote no opinion, but made findings of
fact and conclusions of law (R. 127-143). The opinion of
the Circuit Court of Appeals for the Eighth Circuit (R.
246-254) is reported in 98 F. (2d) 160.

Statute Involved

The Joint Resolution of Congress of June 5, 1933, 48 Stat. 112, 31 U. S. C. A., Section 463, is set forth in appendix. It will be referred to hereafter as the Joint Resolution.

Statement of Case

The facts in this case have been stated in the brief of the other respondents. This statement is confined to facts pertinent to the additional point raised by this respondent against a discrimination in the application of the Joint Resolution against gold-clause bonds and in favor of bonds such as the Debtor's First Terminal and Unifying Bonds containing an option on the part of the holder to receive the equivalent of United States gold coin, of the weight and fineness existing at the time of issue, in foreign moneys.

Southern Pacific Company is a holder as pledgee of \$23,903,000, face amount, of the Debtor's General and Refunding Mortgage Five Per Cent Gold Bonds. By these bonds the Debtor promised to pay to the holders the face amount thereof in gold coin of the United States of America of or equal to the standard of weight and fineness as it existed on the first day of July, 1930. Other bonds issued under other indentures of the Debtor likewise contain provisions for payment in gold coin of the United States of the standard of weight and fineness existing at the time of the issuance of the bonds. These facts were stipulated (R. 168) and included in the Court's findings below (R. 129).¹

¹Southern Pacific Company is also the owner of approximately 87% of the capital stock of the Debtor. Despite the assertions on page 30 of the brief of Harry Hoffman, *amicus curiae*, it is not apparent to us that this fact precludes the Southern Pacific Company from presenting any point properly open to it as the holder of the Debtor's gold bonds.

Without reviewing here the facts as to the issue of the First Terminal and Unifying Bonds fully stated in the brief of the other respondents, it is sufficient to note that these bonds were issued in this country to American purchasers to evidence liability for United States money borrowed, and there is no evidence that the bonds concerned in the trial below of the petitioner's claim belong to other than American citizens (R. 133, 135).

Southern Pacific Company, as a stockholder and creditor of the Debtor, was authorized to file protest to proofs of claim against the Debtor under Subdivision (c) (13) of amendatory Section 77 of the Bankruptcy Act, Title 11, United States Code, Section 205, and under Section 57 of the Bankruptcy Act, Title 11, United States Code, Section 93 (d). It filed a protest and supplemental protest to proof of claim of the petitioner, as Trustee of the First Terminal and Unifying Bonds. It pleaded therein all of the grounds of protest included in the protest and supplemental protest filed by the other respondents herein. In addition, after stating preliminary facts, it alleged in Paragraph 3 of its protest:

"that if the said Joint Resolution of Congress of June 5, 1933, should be interpreted to render invalid the provisions contained in the said General and Refunding Mortgage Gold Bonds for payment in gold coin of the United States of America of the standard of weight and fineness existing on July 1, 1930 and not to render invalid or ineffective the above set forth provisions of the First Terminal and Unifying Bonds for payment in United States gold coin, or, at the option of the holder, in specified foreign moneys, intended as the equivalent of such gold coin, and should cause or permit the claims in behalf of the holders of said First Terminal and Unifying Bonds to be enhanced by reason of the said multiple currency provision, at the cost and expense of the holders of the General and Refunding Bonds, the said Joint Resolution of Congress of June 5, 1933, as so interpreted and applied, would be arbitrary, capricious, and would

discriminate without reasonable basis, against the holders of General and Refunding Mortgage Bonds, containing gold clauses, and in favor of the holders of First Terminal and Unifying Bonds, containing the said multiple currency provision, and would deny to this protestant and to other holders of the said General and Refunding Bonds the equal protection of the laws and it and they would be deprived of property without due process of law in contravention of the Fifth Amendment to the Constitution of the United States of America;". (R. 117.)

The decisions of the Courts below to the effect that the First Terminal and Unifying Bonds were obligations payable in money of the United States to be discharged upon payment, dollar for dollar, in present United States legal tender, obviated the discrimination feared by this respondent and which will exist if petitioner prevails in this case.

Summary of Argument

I. The foreign money options contained in the Debtor's First Terminal and Unifying Bonds served the same purpose, of assuring against the future depreciation of the dollar, and gave the same measure of recovery, in an action upon the bonds, as did the gold clause contained in the Debtor's other bonds. Upon the facts in this case, it is clear that the amounts of foreign moneys named in the foreign money options were intended as the equivalents in value of 1000 dollars in United States gold coin, and the purchasers of the bonds did not desire the foreign moneys as such. The American purchasers and holders of the Debtor's gold-clause bonds are similarly situated in every material respect with the American purchasers and holders of the Debtor's First Terminal and Unifying Bonds.

II. An interpretation of the Joint Resolution which strikes down the gold clause, but leaves untouched the foreign money options, discriminates arbitrarily and capriciously against the holders of gold-clause bonds and in favor of holders, similarly situated, of bonds payable in United States money containing foreign money options and, in this case, the resultant favorable treatment of the holders of the foreign money option bonds causes a corresponding detriment to the holders of gold-clause bonds who otherwise would have shared *pari passu*. The Joint Resolution, if so interpreted, offends against the Fifth Amendment to the Constitution of the United States.

III. To interpret the Joint Resolution so as to permit such arbitrary classification, violates the principles of statutory construction that a statute should not be interpreted so as to give rise to grave doubts as to its constitutionality, and should not be interpreted so as to cause hardships and unwarranted discriminations. The Joint Resolution should be interpreted, as it was by the Courts below, to effectuate its purpose and in accordance with the rule requiring that exceptions from the general policy which the law embodies should be strictly construed.

IV. The Joint Resolution may and should be interpreted so as to direct the discharge of the Debtor's First Terminal and Unifying Bonds upon payment, dollar for dollar, in any coin or currency of the United States which at the time of payment is legal tender.

ARGUMENT

I

The foreign money options contained in the Debtor's First Terminal and Unifying Bonds served the same purpose, of assuring against the future depreciation of the dollar, and gave the same measure of recovery, in an action upon the bonds, as did the gold clause contained in the Debtor's other bonds. Upon the facts in this case, it is clear that the amounts of foreign moneys named in the foreign money options were intended as the equivalents in value of one thousand dollars in United States gold coin, and the purchasers did not desire the foreign moneys as such. The American purchasers and holders of the Debtor's gold-clause bonds are similarly situated in every material respect with the American purchasers and holders of the Debtor's First Terminal and Unifying Bonds.

The purpose of the gold clause was to afford a definite standard of value, and to protect the creditor at the expense of the debtor against depreciation of the dollar. *Norman v. Baltimore & Ohio R. Co.*, 294 U. S. 240, 302.

A like purpose was served by the foreign money options contained in the Debtor's First Terminal and Unifying Bonds. The District Court found (R. 134):

"the provisions contained in said bonds for optional payment in guilders or other foreign moneys were an assurance, in addition to the 'gold clause' contained in the bonds, to the holders thereof against a depreciation in the value of the United States dollar."

The Circuit Court of Appeals concluded (R. 252, 253):

"The effect is to freeze the unit of payment as of the gold dollar of the weight and fineness of January 1, 1912. The provision afforded a facile method by which every bond and interest coupon of the indebtedness—whether owned abroad or in this country—could be easily converted into payment in domestic gold dollars

of a given weight and fineness or the foreign money (measured thereby) most advantageous to the holder at the time of payment. Since the face amount of the obligations is calculated in terms of the gold dollar at a specific date, the real effect is to give an option of payment in the most advantageous money (foreign or domestic) which, at the time of payment, nearest approaches the specified gold dollar value. By the simple expedient of immediately purchasing 'dollars' after securing payment in guilders, pounds, marks or francs, the holder acquires, within the United States, a substantial premium over what could have been realized by receipt of payment in the United States. Hence, the holder is secured from depreciation of the gold dollar not only by a gold clause provision but by a four-fold further assurance in these foreign currencies of values based on the specified gold dollar."

These findings were made upon the facts of this case. The record herein establishes conclusively that the Debtor's First Terminal and Unifying Bonds were United States money contracts, that the amounts of foreign moneys mentioned in the options were intended as and were expressed to be the equivalents in value of the face amount of the bonds as expressed in United States gold coin, and that the bondholders did not desire foreign moneys as such.² The following evidentiary facts sustain these conclusions.

(a) The bonds were sold by an American railroad company to American purchasers (R. 158, 160).³

²cf. *Holyoke Power Co. v. Paper Co.*, 300 U. S. 324, 335—"The lessor was a water power company, engaged in that business and not in any other. There is no pretense that it was stipulating for gold to be used in art or industry."

³As late as July 1, 1935, the holdings of these bonds outside of this country were very limited (R. 198). Of 1,730 holders, only 37 did not reside within this country. At that time none of the foreign holders held a substantial number of these bonds, with the exception of Anglo-Continentale Treuhand, A. G., a Liechtenstein corporation, represented by Harry Hoffman, *amicus curiae* herein. His client's holdings were obtained after the adoption of the Joint Resolution, as he frankly admits on page 41 of his brief in this Court. Evidently additional bonds of this issue have been purchased by Liechtenstein corporations represented by Mr. Hoffman since 1935, see his brief, page 2.

(b) The bonds were sold for American dollars and were the negotiable evidences of an American dollar debt (R. 160).

(c) The record is devoid of the slightest relationship of these American money borrowing contracts to the guilder or to any other foreign money.

(d) The primary nature of the promise to pay dollars is evidenced by the following indenture provisions to the effect that the bonds shall in all cases be payable in United States gold coin in New York, although they may be also payable in other places in other moneys:

"said bonds, both as to principal and interest, to be payable at the office or agency of the Railway Company in the Borough of Manhattan, in the City and State of New York, in gold coin of the United States of America of or equal to the standard of weight and fineness as it existed January 1, 1912 (the coupon bonds also to be payable, both as to principal and interest, at such places in the following cities in foreign countries as the Board of Directors may from time to time designate, viz.: London, England, or Amsterdam, Holland, or Berlin, Germany, or Paris, France)" (R. 18).

"Whereas, the First Terminal and Unifying Mortgage Coupon Bonds may be payable, at the option of the holder, both as to principal and interest, at some one or more of the following places in addition to the City of New York, and in the moneys current at such respective places of payment, at the following rates of exchange or equivalents of \$1,000, viz.: In London, England, £205.15.2 Sterling, or in Amsterdam, Holland, 2490 guilders, or in Berlin, Germany, 4200 marks, D.R.W., or in Paris, France, 5180 francs;" (R. 18, 19.)

The amounts of foreign moneys in which the coupon bonds might also be payable are expressly stated in the indenture to be the equivalents of \$1,000 United States gold coin, both in the passage above quoted and in Article First, Section 4:

"but the face amount of each of such coupon bonds shall be \$1,000 in United States gold coin of the standard of weight and fineness existing on January 1, 1912, or the equivalent thereof, calculated at the rates of exchange stated in the form of coupon bond hereinbefore set forth." (R. 39.)

(e) That the parties assumed that the amounts of foreign moneys mentioned in the foreign money options were the equivalents of \$1,000 of United States gold coin is further evidenced by the arrangement that coupon bonds containing gold clauses and foreign money options (R. 19) were interchangeable (R. 36) with registered bonds containing the gold clause alone (R. 22).

(f) A coupon bond in the face amount of \$1,000 United States gold coin, but containing foreign money options, could be issued under the indenture upon expenditure by the Debtor of \$1,000, for capital expenditures or prior debt retirement (R. 40, et seq.), a provision only consistent with the assumption that the foreign money options called for the equivalents of \$1,000 in United States gold coin.

(g) From the time these bonds were issued in 1912 until July 1, 1935, after the reduction in the value of the United States dollar, there was not a single request for payment of coupons appurtenant to these bonds in guilders, in Amsterdam or elsewhere (R. 198).

The petitioner in effect concedes that the foreign money options were not inserted because of a desire of the holders of the bonds for the foreign moneys as such, but that instead they were inserted as a measure of the United States money value which would ultimately inure to the holders by reason of the foreign money options. On page 21 of its brief, it says:

"The contention will be made that the foreign money alternatives were intended for the benefit of

aliens only, and not of citizens, and that most of the bondholders whom the petitioner represents are Americans. No indication of such an intent can be found within or outside of these instruments. The bonds were sold to an original group of American purchasers (R. 132-4) whose attention was specifically called to the fact that they were payable in foreign currencies, at the election of the holder (R. 133-4, 160). There is no indication in the terms of the bonds and coupons, and there was no suggestion to purchasers at the time of sale, that the holder could receive payment only in the currency of his domicile."

Petitioner combats the conclusion that the amounts of moneys mentioned in the foreign money options were intended as the equivalents of United States gold coin of the 1912 standard of weight and fineness. On January 1, 1912, the United States, England, Holland, Germany, and France were all upon the gold standard and in such circumstances the only fluctuations in value between the moneys of these countries would be those too small to be corrected by gold shipments. *Escher, Modern Foreign Exchange*, 55, 58, 59; *York, International Exchange*, 43. As has been emphasized by writers upon foreign exchange, where the countries involved are upon the gold standard, "The basic fact underlying the general principles of foreign exchange between gold standard countries is that money payments in those countries are in essence gold deliveries made at a particular time and place. Assuming the absolute gold standard in the United States, the American merchant who pays \$10,000 for goods with a check on his bank, to all intents and purposes orders the bank to deliver immediately on his behalf to the seller at its office 232,200 grains (10,000 X 23.22) of the gold it owes him, that is, of the deposit balance." (York, *supra*, page 19; and see page 22). It was possible in 1912 to state the equivalent of \$1,000 United States gold coin in the money of a foreign country, and that equivalence would continue so long as the international gold standard functioned.

Why was it that the foreign money options were inserted in the bonds, since it appears that the transaction had no international aspects whatever? The finding on this point by the District Court is (R. 134) that the foreign money options were an additional assurance to the holders of securing the value of United States gold coin of the 1912 standard. This is the only rational conclusion in the light of the lack of any relationship of the transaction to any foreign money. It is the proper conclusion, whether the parties gave great or little weight to the further protection afforded by the foreign money options. In either event the intent was for the Debtor to assure the creditor of the receipt of the value of the United States gold coin face of the bonds.

The foreign money options contained in the First Terminal and Unifying Bonds afforded the same type of protection as did the gold clause contained in the Debtor's bonds. It has now been authoritatively established that the gold clause provision as contained in the Debtor's bonds, if valid, gives the holders of the bonds a right to receive from the obligor an increased amount of currency to compensate for a devaluation of the gold content of the dollar or other monetary unit. *Norman v. Baltimore & Ohio R. Co.*, 294 U. S. 240, 302; *Feist v. Societe Intercommunale Belge d'Electricite*, L. R. [1934] A. C. 172, 173, 88 A. L. R. 1524; see Mr. Justice Stone's concurring opinion, *Smyth v. United States*, 302 U. S. 329, 361. In the absence of the Joint Resolution, and if there were a free market for gold, the holders of the gold-clause bonds would be entitled to receive \$1,690 per thousand dollar bond, approximately the amount that the petitioner is claiming here in respect to the First Terminal and Unifying Bonds.

The recovery per bond in respect to the guilder option contained in the First Terminal and Unifying Bonds asserted by the petitioner in this case is practically identical to the recovery per bond which would be realized upon

gold-clause bonds if the Joint Resolution had not been adopted. The option sought to be exercised by petitioner was for 2,490 guilders, and that number of guilders was in 1912 the equivalent of \$1,000 of United States gold coin of the standard of weight and fineness existing on January 1, 1912 (R. 134). This is a matter of calculation from the stipulation to the effect that the guilder was then worth \$.4020 (R. 168). The petitioner seeks to sustain a claim upon the basis of approximately \$1,690 per bond for \$1,000 of United States money face (R. 105).

In the absence of the Joint Resolution, the protection against the depreciation of the dollar which this petitioner secured through the gold clause was as full and complete as the protection afforded by the foreign money options of the First Terminal and Unifying Bonds. The accuracy of this statement is not defeated by pointing out, as petitioner does, pages 25 to 27, its brief, that the guilder may depreciate in value so as to diminish somewhat the protection afforded by the optional provision. So too, the completeness of the protection of a valid gold clause may be defeated by the lack of a free market for gold. *Perry v. United States*, 294 U. S. 330. The fact remains that the gold-clause obligee and the obligee of bonds with foreign money options had alike contracted for protection against depreciation of the United States monetary unit.

If monetary conditions had remained as they were in 1912, the measure of protection provided by the gold clause provision and by the guilder and other foreign money options would have been substantially the same. If the United States and Holland had each continued on the gold standard as it existed in 1912, the maximum value of the guilder would be its gold par, \$.4020 (R. 168), plus the comparatively slight cost of shipping gold from the United States to Holland, *Goschen, The Theory of the Foreign Exchanges* (4th Ed.), page 47, and it would have made no substantial financial difference whether a bondholder had elected to receive \$1,000 in United States gold coin or 2,490 guilders.

If Holland suspended the delivery of gold for guilders or reduced the gold content of the guilders, while the United States continued on its pre-existing gold standard, the United States gold coin clause, if valid, would be the more effective protection against monetary depreciation. On the other hand, since United States gold coin of the 1912 gold content became unobtainable in the United States in 1933 and the guilder remained on the previous gold basis until September 27, 1936 (R. 140), the guilder option, if valid, during these years provided a method of preserving to the bondholders the value of the 1912 United States gold coin.* Since September 27, 1936 (R. 140), both the dollar and the guilder are worth less than the value of the gold to which they were respectively equivalent in 1912. Since the guilder has depreciated less than the dollar, the guilder option partially accomplishes the object of compensating the creditor at the expense of the debtor against monetary depreciation. To sum up, under a continuation of the pre-war gold standard, either the gold clause or the foreign money options would secure to the bondholder the value of United States gold dollars of the 1912 standard; the fortuities of war and depression which lead to monetary devaluation and artificial monetary controls might prevent either the gold clause or the foreign money options from carrying out such assurance to the creditor, or might result in one clause being effective and the other ineffective. Both types of clauses were designed to, and each clause was effective to some extent (absent legislation such as the Joint Resolution) in safeguarding the creditor at the expense of the debtor against monetary devaluation.

Petitioner has suggested no vital difference, justifying different treatment under the Joint Resolution, between the American holders of the Debtor's First Terminal and Unifying Bonds and the many American holders of bonds of

*The petitioner claims that the guilder should be valued for the purposes of its claim on December 12, 1935, or, alternatively, upon certain other dates prior to September 27, 1936 (R. 105).

American companies containing the gold clause. All of these bondholders must receive their money and meet their expenses and obligations in money of the United States. No relationship of the issue of the First Terminal and Unifying Bonds to guilders or any other foreign moneys has been or can be pointed to. Petitioner relies solely upon the proposition that the holders of bonds payable in United States money, with optional provision for payment in foreign moneys, astutely or fortuitously obtained a provision guarding against dollar depreciation which, because of the comparatively small number of bonds containing such a provision, escaped the notice of Congress when it passed the Joint Resolution. In no view of the Joint Resolution do we think this proposition true, but certainly we submit the Joint Resolution must be applied to the bonds in the instant case when the very indenture securing the bonds and upon which the petitioner's claim is based identifies the guilders sought as the equivalent of the principal amount of the bonds as expressed in United States gold coin (R. 39). True it is, as petitioner says, page 25 of its brief, 2,490 guilders were determined to be the equivalent of \$1,000 of United States gold coin of the standard of weight and fineness existing on January 1, 1912, and there was no provision in the indenture for the number of guilders to decrease with a reduction in the standard of weight and fineness of the dollar. It is not true that this consideration weighs against the application of the Joint Resolution. The very reason why these bonds should be dischargeable, dollar for dollar, in United States legal tender, irrespective of the foreign money options, is that the foreign money options give to the holder the equivalent of the gold coin of the standard of weight and fineness existing prior to the reduction in the gold content of the dollar in 1934. If the foreign money options provided that the number of foreign monetary units should decrease with a depreciation of the monetary unit of this country, there would have been no point in legislation to render such options ineffective.

The brief of Harry Hoffman, *amicus curiae*, stresses (p. 3 thereof) the following quotation taken from article of Professor Nussbaum, Multiple Currency and Index Clauses, 84 U. of Pa. L. R. 569, 575: "However, diversity, and fundamental diversity, between gold clauses and multiple currency clauses appears when the situation is regarded from an economic and political standpoint." We need not consider whether this is true where the foreign money option is inserted in an international contract. It seems to us that this record shows conclusively that on the facts of this case there is no diversity from either an economic or political standpoint between the gold clause provisions and the foreign money options in these bonds sold and held domestically.

There are two classes of persons before this Court. One class is composed of American lenders who bargained to be paid in gold coin of the United States of a certain standard of weight and fineness, or in an amount of currency equivalent thereto. The other class is composed of American lenders who bargained to be paid in gold coin of the United States of a certain standard of weight and fineness, or in an amount of foreign moneys equivalent thereto. Neither class may receive gold coin which is no longer in circulation, and the claims of both classes must be allowed in terms of United States currency in a reorganization proceeding. We submit there is no substantial difference in the situation of the two classes justifying a hostile discrimination against one class and in favor of the other class.

II.

An interpretation of the Joint Resolution, which strikes down the gold clause, but leaves untouched the foreign money options, discriminates arbitrarily and capriciously against the holders of gold-clause bonds and in favor of holders, similarly situated, of bonds payable in United States money containing foreign money options and, in this case, the resultant favorable treatment of the holders of the foreign money option bonds causes a corresponding detriment to the holders of gold-clause bonds who otherwise would have shared *pari passu*. The Joint Resolution, if so interpreted, offends against the Fifth Amendment to the Constitution of the United States.

In the absence of the Joint Resolution, the holders of the First Terminal and Unifying Bonds and the holders of the Debtor's gold-clause bonds would have shared ratably in the assets of the Debtor, subject only to differences in the varying mortgage liens.

If the Joint Resolution should be interpreted as applicable to both First Terminal and Unifying Bonds and the Debtor's other gold-clause bonds, and as directing that all such bonds shall be payable, dollar for dollar, in United States currency, the relative rights of the parties will remain undisturbed—the First Terminal and Unifying Bonds and the gold-clause bonds would continue to share ratably in the mortgage estate, subject to the respective mortgage priorities.

If the Joint Resolution is interpreted to direct the discharge of the Debtor's gold-clause bonds, dollar for dollar, in United States currency, but not so to direct the discharge of the First Terminal and Unifying Bonds, the parity between the two classes of bonds will be disturbed. Not only will the First Terminal and Unifying Bonds receive better treatment than the holders of the Debtor's gold-clause bonds, but the preferential treatment accorded the First

Terminal and Unifying Bonds will be largely at the expense of the gold-clause bondholders. The First Terminal and Unifying Bondholders will take more, and the gold-clause bondholders will take less, than they would otherwise. If the assets of the Debtor were being sold and the proceeds of sale distributed ratably between the creditors, it would be obvious that an expansion of the claim of one creditor would diminish correspondingly the portion to be received by other creditors. This is equally true where securities upon a reorganization are to be distributed instead of cash upon liquidation. Indeed, if the Joint Resolution had not been passed by Congress and sustained by the Supreme Court, the petitioner purporting to act for holders of the First Terminal and Unifying Bonds would have no motive in seeking to enforce the guilden option. The disparity, advantageous to the First Terminal and Unifying Bondholders, which would result in applying the Joint Resolution to one form of contract guarding against dollar devaluation and not to another contract accomplishing the same result, is the occasion for insistence by the Guaranty Trust Company on its present claim. The petitioner finds in discrimination an opportunity for advantage.

When hearings were had upon the reorganization plan of the Debtor before an Examiner of the Commission and Mr. Commissioner Mahaffie, the discrimination inherent in the claim of Guaranty Trust Company of New York in behalf of the First Terminal and Unifying Bondholders was brought out clearly in a colloquy between Mr. Commissioner Mahaffie and the witness, Mr. Glines, the Chairman of the Protective Committee for the First Terminal and Unifying Bondholders (Reporter's Minutes, St. Louis Southwestern Railway Company—Reorganization—I.C.C. F.D. No. 11040, pp. 686-689):

“Commissioner Mahaffie: Well, assuming you have dollar claims or gold claims, expressed in the terms of the bond as originally issued, it is payable, I assume in gold, how do you justify that different treatment

in reorganization on a defaulted issue of a bond issue payable in Guilders than one payable in gold coin of a certain fineness?

"The Witness: Mr. Mahaffie, I do see a difference.

"Commissioner Mahaffie: What is it?

"The Witness: The difference is that the company has covenanted to pay in any one of different forms of money. The difficulty in answering your question in one way arises through the fact that foreigners buy these bonds because they want their income in the money of their country. The time arises when it is impossible to distinguish between the foreign holder who bought it on that basis and the domestic holder who might have gone abroad and likely is now foreign. Therefore, the only way that I know of to treat them is to treat them all alike.

"Commissioner Mahaffie: Now, that was not quite the distinction I was trying to get your explanation on.

"My point is: I assume these bonds were supposed to be payable in gold of a definite standard?

"The Witness: That is right, or the pound Sterling, or whatever it is, the reich mark or franc, and so on.

"Commissioner Mahaffie: Now, your bond is defaulted?

"The Witness: Yes.

"Commissioner Mahaffie: You are having to replace it in reorganization proceedings?

"The Witness: Right.

"Commissioner Mahaffie: Why should greater emphasis be given in the proceeding to such a guilder clause than to the, we will say the Gold Clause?

"The Witness: You are asking me a legal question, and I am not a lawyer, as I said."

The First Terminal and Unifying Bonds are worded differently from other gold-clause bonds of the Debtor, but the result is the same, in that as a result of both forms of bonds, an increased number of dollars is secured in order to compensate for the reduction in the gold content of the dollar.

The Fifth Amendment to the Constitution of the United States, prohibiting Congress from depriving any person of

property without due process of law, condemns acts of Congress arbitrarily and capriciously discriminating between classes of persons without reasonable basis. *Retirement Board v. Alton R. Co.*, 295 U. S. 330, 359, 360; *Brushaber v. Union Pacific R.R.*, 240 U. S. 1, 24; *Knowlton v. Moore*, 178 U. S. 41, 77; *Sims v. Rives* (Ct. A., D. C.), 84 F. (2d) 871, 878. We do not believe that there is an adequate basis for discrimination where two classes of persons standing in the same position contract for the same protection, with variation only in device employed for the accomplishment of the result, especially where the protection of one class would be at the expense and cost of the other. We do not discuss the constitutional question further because the considerations pertinent thereto are equally cogent as arguments in favor of the interpretation of the Joint Resolution contended for by respondents.

III.

To interpret the Joint Resolution so as to permit such arbitrary classification, violates the principles of statutory construction that a statute should not be interpreted so as to give rise to grave doubts as to its constitutionality, and should not be interpreted so as to cause hardships and unwarranted discriminations. The Joint Resolution should be interpreted, as it was by the Courts below, to effectuate its purpose and in accordance with the rule requiring that exceptions from the general policy which the law embodies should be strictly construed.

An interpretation of a statute which will render it unconstitutional or even raise serious doubts as to its constitutionality will not be adopted when there is another interpretation which will avoid such constitutional questions. *Labor Board v. Jones & Laughlin*, 301 U. S. 1, 30. Furthermore, an interpretation is to be favored which does not result in unreasonable and oppressive discriminations, and consideration must be given to all persons affected, and not

only to those before the Court in the particular case. *Bloomer v. McQuewan*, 14 How. 539, 553; *Lau Ow Bew v. United States*, 144 U. S. 47, 59; *Burnet v. Guggenheim*, 288 U. S. 280, 285, 286. In interpreting a statute the purpose to be accomplished and the mischief to be remedied must be considered, and the statute should be interpreted to effect the purpose ascertained from a view of the pertinent legislative and administrative history. *Royal Indemnity Co. v. American Bonding Co.*, 289 U. S. 165, 169; *Norwegian Nitrogen Co. v. United States*, 288 U. S. 294, 303, 308; *Heydenfeldt v. Daney Gold & S. Mining Co.*, 93 U. S. 634, 638. A statute should be construed to effectuate its remedial purpose and there should be applied "the elementary rule requiring that exceptions from the general policy which a law embodies should be strictly construed". *Spokane & Inland R. R. Co. v. United States*, 241 U. S. 344, 350; *Piedmont & Northern Ry. v. Interstate Commerce Commission*, 286 U. S. 299, 311.

The keynote running through the Congressional discussion of this legislation prior to its enactment was equality and lack of discrimination. Some extracts from the Congressional Record, 73d Congress, 1st Session, appear on pages 85 to 88 of brief of the other respondents. It is sufficient here to point out that Mr. Steagall, the Chairman of the Committee in charge of the Resolution in the House of Representatives, said (Cong. Rec. 73d Cong., 1st Session, at p. 4586):

"If I had my way I would not under any conditions permit one citizen to contract for the discharge of a debt in one kind of currency and another citizen to contract for the discharge of a debt in another kind of currency. It seems to me sound public policy demands that there be no discrimination."

If we are correct in our view that the method of discharge of the Debtor's First Terminal and Unifying Bonds is plainly prescribed by the second sentence of the

Joint Resolution, there is no room for the application of rules of statutory construction. But counsel for petitioner has urged earnestly that the Joint Resolution does not so provide, and in this connection contends that restricted meanings should be ascribed to the words "obligation" and "payable" as used in the Joint Resolution. If there is ambiguity, the principles of construction mentioned above have application and lead, we believe, to the interpretation of the Joint Resolution made by the Courts below.

IV.

The Joint Resolution may and should be interpreted so as to direct the discharge of the Debtor's First Terminal and Unifying Bonds upon payment, dollar for dollar, in any coin or currency of the United States which at the time of payment is legal tender.

Discriminations, arbitrary and unjust, must occur unless the Joint Resolution is given in fact the full reach which its language literally commands, so as to direct the discharge of "every obligation" payable in money of the United States "heretofore or hereafter incurred", "whether or not any such provision is contained therein or made with respect thereto", dollar for dollar in legal tender currency.

Not only does the construction of the Joint Resolution for which the petitioner contends work an arbitrary and unreasonable discrimination in this instance, but it cannot explain cases already decided or provide a reasonable solution for cases which may arise hereafter.

We agree that the Joint Resolution applies only to obligations payable in money of the United States. Paragraph (b) of the Joint Resolution makes any other construction untenable. Consequently, the statute does not affect a contract to deliver a commodity only, a contract to pay foreign moneys only, or a contract to deliver gold bullion only (although it may be difficult to establish dam-

ages at this time for breach of a gold bullion contract). Where, however, the contractual duty in one of the above respects arises by reason of a provision contained in or made with respect to an obligation payable in money of the United States, the second sentence of the Joint Resolution prescribes the discharge of the obligation, dollar for dollar, in legal tender. The courts, in *Anglo-Continentale Treuhand, A. G. v. St. Louis Southwestern Railway Company* (C. C. A. 2), 81 F. (2d) 11, 12 (certiorari denied, 298 U. S. 655), and in *McAdoo v. Southern Pacific Company* (Dist. Cal.), 10 F. Supp. 953, 954, reversed 82 F. (2d) 121, were under a misapprehension if, as appears likely from the opinions, they thought that the defendants were contending that a contract solely to pay foreign moneys was invalid under the Joint Resolution.

The first and most extended opinion supporting the position of the petitioner and arguing for the non-application of the second sentence of the Joint Resolution to a contract to pay United States gold coin, or, at the holder's option, foreign moneys, was the dissenting opinion of Mr. Justice Merrell in *City Bank Farmers Trust Co. v. Bethlehem Steel Co.*, 244 App. Div. 634, 644, 280 N. Y. Supp. 494, 505, and his argument has been much relied upon by those who have taken the side of the case which he espoused, cf. petitioner's brief, pages 73, 81. It is summed up in this sentence:

"It seems perfectly plain to me that, where the contract here gave to the obligee the right to require payment by the obligor in either of three different places, in the currency mentioned in the coupon, when the option was exercised the contract must be read as though the obligor had contracted to do only that which was required by the obligee."

In other words, this argument is that where the option was exercised to take guilders, the bonds should be read as if they were never payable in United States money, and thus

regarded as outside of the reach of the Joint Resolution which deals only with obligations payable in money of the United States. Without considering the lack of logical basis for holding that a contract which was payable in United States money should be regarded as not payable therein *ab initio* because the promisee chose a substituted performance, it is sufficient to point out that the argument proves too much, and it was necessarily repudiated by this Court in *Holyoke Power Co. v. Paper Co.*, 300 U. S. 324. If there is an obligation to pay \$100 in United States gold coin, or 2,580 grains of gold, at the promisee's option, upon the exercise of the option for gold, the contract, under Mr. Justice Merrell's argument, should be regarded as solely a contract for the delivery of gold, not one for the payment of money, and without the reach of the Joint Resolution. Manifestly, this defeats the application of the Joint Resolution to a case which it was designed to cover. When this Court in *Holyoke Power Co. v. Paper Co.*, *supra*, had a contract before it providing for alternative performance by delivery of gold bullion or currency measured by gold bullion, it did not find that the present desire of the promisee to have gold bullion made the obligation one not for the payment of United States money, but instead it held the Joint Resolution to be applicable. It is beside the mark to distinguish the *Holyoke Power Co. v. Paper Co.* decision, as is done by petitioner, its brief, page 68, upon the ground that it involved the delivery of gold bullion. A contract to deliver gold bullion is not within the reach of the Joint Resolution if it is not contained in or made with respect to an obligation payable in money of the United States—and, if the obligation is one to pay in money of the United States, it is to be discharged, dollar for dollar, in legal tender. Neither may the *Holyoke* case be distinguished, as argued by petitioner below, on the ground that the option there was in the promisor, instead of the promisee. The fact, in the instant case, that the bondholders have the unqualified election and enforceable right to demand dollars

clinches the conclusion that the bonds were payable in money of the United States.

The petitioner urges that the Joint Resolution could not in reason apply to all contracts performable alternatively by payment in money or by delivery of a commodity. It cites, page 97 of its brief, the example of a contract to deliver a commodity or to pay \$100 as a penalty or as liquidated damages. The initial inquiry in the application of the Joint Resolution is whether the contract is truly a contract payable in money of the United States—a money contract. This inquiry cannot be answered solely by examination of the phraseology of the contract, but the consideration and the surrounding circumstances must also be considered. The answer is plain where the contract is for the delivery of a commodity or the payment of money as a penalty or as liquidated damages. Such contracts are primarily commodity contracts, and the money alternatives are secondary thereto. They are not money contracts coming within the scope of the Joint Resolution. The inquiry which the Court must make in order to determine whether an alternative obligation is primarily an obligation payable in money of the United States so as to be within the reach of the Joint Resolution, is akin in scope and in the elements to be considered to the inquiry which a Court makes in connection with an alternative contract to ascertain whether it is a true alternative contract or whether one of the alternatives is merely a penalty. In making the inquiry as to whether a contractual provision is really a penalty, this Court said, *Embrey v. Jemison*, 131 U. S. 336, 344: "The mere form of the transaction is of little consequence. . . . The essential inquiry in every case is as to the necessary effect of the contract and the real intention of the parties." The rule is expressed in *Restatement, Contracts*, Section 325, Comment b, as follows: "It is not every promise that is expressed in the form of an alternative that imposes a duty on the promisor of performing whichever alternative he sees fit. As

the question of liquidated damages or penalty is based on equitable principles, its determination cannot depend on the form of the transaction but rather on its substance." Just as the Court in enforcing the judge-made rule of public policy that penalties are unenforceable must examine the consideration for and the circumstances surrounding an alternative contract in order to determine whether a particular alternative is a penalty or not, so must the Court in applying the Congressional rule of public policy enacted in the Joint Resolution examine the consideration for and the circumstances surrounding an alternative contract for the payment of money or the delivery of a commodity, to ascertain whether it is in truth a money contract within the reach of the Joint Resolution.

When viewed in this light, the contention (brief of petitioner, p. 47; brief of *amicus curiae*, p. 16) loses point that a bondholder should be no worse off because his bond contained several alternatives than if it were a bond payable solely in Dutch guilders. Under the facts in this case, the bond was a United States money contract, and the foreign money options were but another method of securing the equivalent in value of United States gold coin. There is no attempt to give the language of the Joint Resolution one meaning under one set of circumstances, and another meaning under another set of circumstances (see p. 86, petitioner's brief). The meaning of the Joint Resolution remains constant, but its application to varying transactions will depend upon the intent of the parties thereto and the surrounding circumstances as well as upon the words of the contracts involved.

Counsel upon the petitioner's side of the case have argued that the second sentence of the Joint Resolution should be limited by confining it to directing the method of discharge of obligations payable in money of the United States which contain a provision specifically mentioned in the first sentence of the Joint Resolution and no other provision. We are at a loss to understand the basis for this

contention when the statute itself directs the method of payment of every obligation payable in money of the United States *whether or not* any of such provisions is contained therein. The Committee reports and the debates of Congress emphasize the second sentence of the Joint Resolution equally with the first sentence (Respondent Henwood's brief, p. 88). Congress intended to deal in a comprehensive way with the discharge of United States money contracts and it did so by the command of the second sentence of the Joint Resolution.

The Joint Resolution applies to contracts to be made in the future as well as to those made in the past. So far as the future is concerned, it would have been of small use to have proscribed provisions of certain wording contained in an obligation to pay money of the United States if a creditor remained free to insist upon the insertion of other provisions in United States money bonds accomplishing the same result and casting the burden of a future devaluation of the dollar upon the debtor. To meet this contingency, Congress in the second sentence of the Joint Resolution dealt comprehensively with the discharge of every obligation payable in money of the United States. If it be determined that the Joint Resolution does not touch contracts of the character under discussion, there is no reason why in the future bonds will not be drawn so as to provide for payment in United States money or optionally in moneys of various countries, thus assuring the purchasers of the bonds substantially the same protection against devaluation of the United States dollar as was provided by the gold clause customarily inserted in bonds in the past. Other contractual provisions to be inserted in United States money bonds to accomplish the same object could well be devised. And such provisions, if efficacious, interfere to the same extent as the gold clause with the constitutional power of Congress to regulate the value of money. e

The use of foreign money options in the future, if their validity is upheld, to accomplish the purpose of gold clauses

is not a fancied danger. In the Wall Street Journal of January 12, 1939, a news item appears of a dollar option being inserted in a loan contracted by French railway companies in lieu of the gold clause theretofore used in previous bonds. In carefully guarded language, petitioner on page 85 of its brief concedes that "conceivably" a foreign money option provision in a United States money obligation may serve the same purpose as a gold clause and be condemned as an "evasion" (see also p. 35, petitioner's brief). Petitioner guards this concession by limiting it to obligations contracted after June 5, 1933. But the statute applies to all United States money obligations "heretofore or hereafter incurred." If a contract comes within the Joint Resolution it is because it is an obligation payable in money of the United States, and the same criteria will be applicable in determining that fact whether the obligation was executed in 1912 or in 1939. The first sentence of the Joint Resolution dealt with certain specific contractual provisions. The second sentence of the Joint Resolution provided a rule of performance after June 5, 1933, for all obligations payable in money of the United States, whether entered into before or after that date. A provision in an obligation, whenever contracted, the performance of which, after June 5, 1933, would defeat the statutory command that after that date a United States money obligation should be discharged, dollar for dollar, in United States legal tender, is unenforceable.

It is established in the record in this case that the number of guilders specified in the guilder option was regarded as the fair equivalent of the United States gold coin in which the bonds were payable. If a bond had been drawn specifically providing for the payment of \$1,000 in United States gold coin or the fair equivalent of that amount of gold coin in foreign moneys, we presume that there would be little question as to the application of the Joint Resolution, and that the bond would be dischargeable, dollar for dollar, in United States currency. Here, reading bond and

indenture together, the contract is for the payment of \$1,000 in United States gold coin, or 2,490 guilders, the agreed fair equivalent of that amount of United States gold coin, at the option of the holder. The parties thus agreed upon the number of guilders constituting a fair equivalent of the gold coin of the weight and fineness existing at the time the bonds were issued. The effect of this agreement, solely as a contractual matter, in the absence of legislation, was to prevent a diminution in the amount of guilders called for by the contract when the gold content of the United States dollar was reduced, but the guilder provision nevertheless continued to be an adjunct to and a provision in a gold coin contract. It is no answer to the application of the Joint Resolution to point out, as petitioner does on page 27 of its brief, that the Debtor was aware of the effect of the foreign money options in possibly requiring it to furnish foreign exchange at its own expense. The Joint Resolution is expressly in derogation of existing agreements. It is impossible, we think, to say that the mere specification of the number of guilders considered to be the fair equivalent of United States gold coin took the contract beyond the reach of so comprehensive an expression of the public policy of the United States as the Joint Resolution of Congress of June 5, 1933.

Respectfully submitted,

GEORGE L. BULAND,
Counsel for Respondent
Southern Pacific Company.

BEN C. DEY,
of Counsel.

APPENDIX

(Public Resolution—No. 10—73rd Congress)

(H. J. Res. 192)

JOINT RESOLUTION

To Assure Uniform Value to the Coins and
Currencies of the United States.

WHEREAS the holding of or dealing in gold affect the public interest, and are therefore subject to proper regulation and restriction; and

WHEREAS the existing emergency has disclosed that provisions of obligations which purport to give the obligee a right to require payment in gold or a particular kind of coin or currency of the United States, or in an amount in money of the United States measured thereby, obstruct the power of the Congress to regulate the value of the money of the United States, and are inconsistent with the declared policy of the Congress to maintain at all times the equal power of every dollar, coined or issued by the United States, in the markets and in the payment of debts. Now, therefore, be it

RESOLVED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, that (a) every provision contained in or made with respect to any obligation which purports to give the obligee a right to require payment in gold or a particular kind of coin or currency, or in an amount in money of the United States measured thereby, is declared to be against public policy; and no such provision shall be contained in or made with respect to any obligation hereafter incurred. Every obligation, heretofore or hereafter incurred, whether or not any such provision is contained therein or made with respect thereto, shall be discharged upon payment, dollar for dollar, in any coin or currency which at

Appendix

the time of payment is legal tender for public and private debts. Any such provision contained in any law authorizing obligations to be issued by or under authority of the United States, is hereby repealed, but the repeal of any such provision shall not invalidate any other provision or authority contained in such law.

(b) As used in this resolution, the term "obligation" means an obligation (including every obligation of and to the United States, excepting currency) payable in money of the United States; and the term "coin or currency" means coin or currency of the United States, including Federal Reserve notes and circulating notes of Federal Reserve banks and national banking associations.

SEC. 2. The last sentence of paragraph (1) of subsection (b) of Section 43 of the Act entitled "An Act to relieve the existing national economic emergency by increasing agricultural purchasing power, to raise revenue for extraordinary expenses incurred by reason of such emergency, to provide emergency relief with respect to agricultural indebtedness, to provide for the orderly liquidation of joint-stock land banks, and for other purposes," approved May 12, 1933, is amended to read as follows:

"All coins and currencies of the United States (including Federal reserve notes and circulating notes of Federal Reserve banks and national banking associations) heretofore or hereafter coined or issued, shall be legal tender for all debts, public and private, public charges, taxes, duties, and dues, except that gold coins, when below the standard weight and limit of tolerance provided by law for the single piece, shall be legal tender only at valuation in proportion to their actual weight."

Approved, June 5, 1933, 4:40 P. M.

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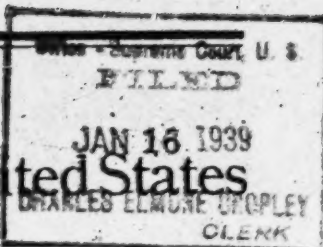
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1938.



No. 384.

GUARANTY TRUST COMPANY OF NEW YORK, as
Trustee under St. Louis Southwestern Railway Com-
pany First Terminal and Unifying Mortgage dated
January 1, 1912,

vs.

Petitioner,

BERRYMAN HENWOOD, Trustee of St. Louis South-
western Railway Company, Debtor; **ST. LOUIS SOUTH-**
WESTERN RAILWAY COMPANY, and SOUTHERN
PACIFIC COMPANY,

Respondents.

BRIEF OF AMICUS CURIAE AND MOTION FOR LEAVE
TO FILE SAME AND FOR LEAVE TO PARTICI-
PATE IN ORAL ARGUMENT AND TO
SUBMIT SUPPLEMENTAL BRIEF.

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IN THE

Supreme Court of the United States

GUARANTY TRUST COMPANY OF NEW YORK,
as Trustee under St. Louis Southwestern
Railway Company First Terminal and
Unifying Mortgage dated January 1,
1912,

Petitioner,

v.

BERRYMAN HENWOOD, Trustee of St. Louis
Southwestern Railway Company, Debtor,
ST. LOUIS SOUTHWESTERN RAILWAY COM-
PANY, and SOUTHERN PACIFIC COMPANY,
Respondents.

OCTOBER
TERM, 1938.

No. 384.

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS* *CURIAE*, AND FOR LEAVE TO PARTICIPATE IN ORAL ARGUMENT AND TO SUBMIT SUPPLEMENTAL BRIEF.

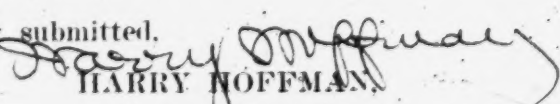
May it Please the Court:

Upon the consent of counsel for all parties hereto, filed herewith, the undersigned respectfully moves this Honorable Court for leave to file the accompanying brief in this case as *amicus curiae*.

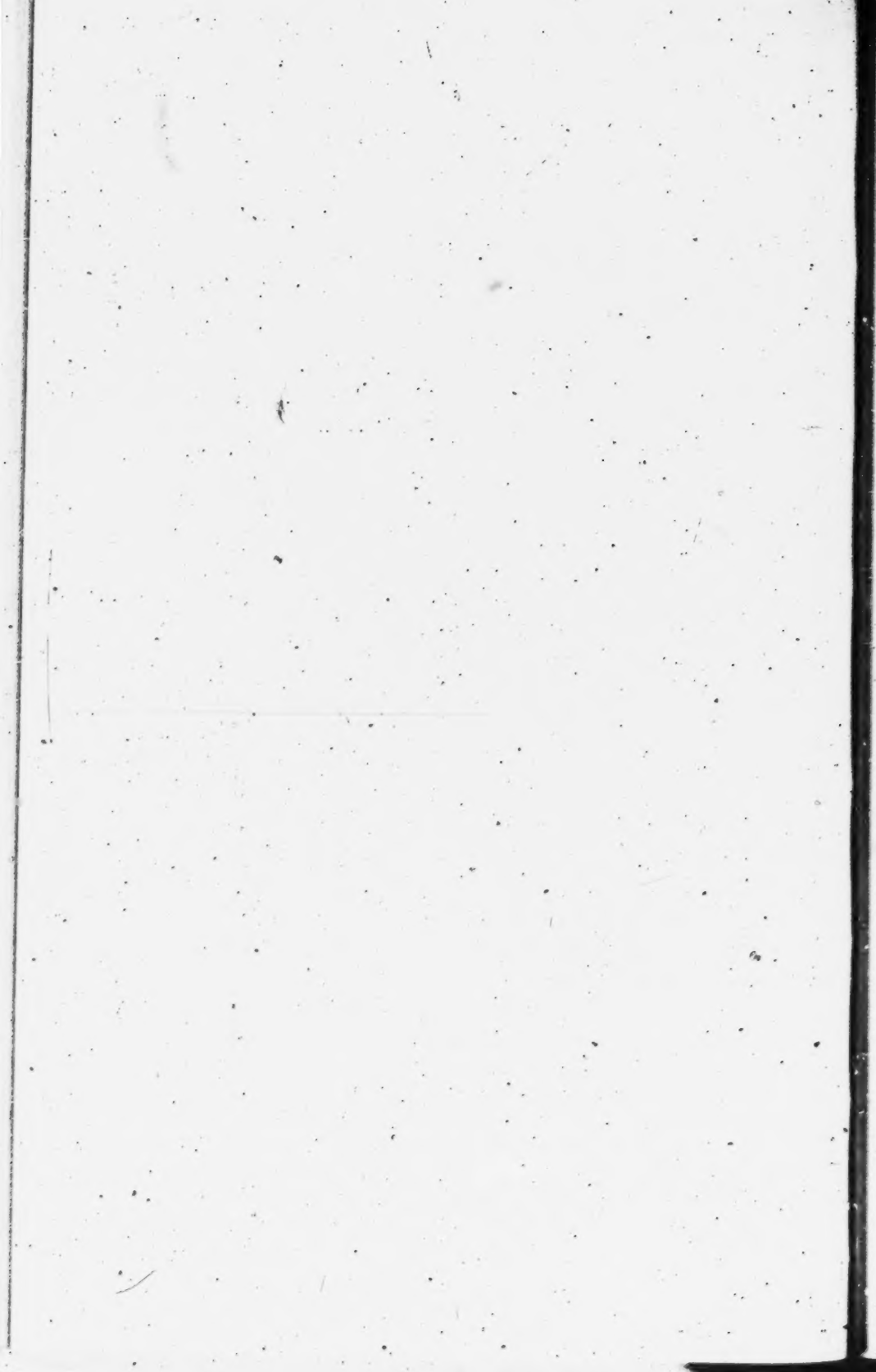
The undersigned also respectfully moves this Honorable Court for leave to participate in oral argument, and for leave to submit a supplemental brief should this Court desire to consider certain questions raised in the courts below but not raised in the petition for the writ of certiorari herein.

Dated, New York, January 14, 1939.

Respectfully submitted,


HARRY NOFFMAN,

as *Amicus Curiae*.



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IN THE

Supreme Court of the United States

GUARANTY TRUST COMPANY OF NEW YORK,
as Trustee under St. Louis Southwestern
Railway Company First Terminal and
Unifying Mortgage dated January 1,
1912,

Petitioner,

v.

BERRYMAN HENWOOD, Trustee of St. Louis
Southwestern Railway Company, Debtor,
ST. LOUIS SOUTHWESTERN RAILWAY COM-
PANY, and SOUTHERN PACIFIC COMPANY,
Respondents.

OCTOBER
TERM, 1938.

No. 384.

BRIEF OF *AMICUS CURIAE*.

I.

STATEMENT AS TO CONSENTS TO FILING THIS BRIEF.

This brief is submitted pursuant to written consent, granted by counsel for all parties hereto, viz.: by counsel for Petitioner in a letter dated December 27, 1938; by counsel for Respondents Berryman Henwood, Trustee of St. Louis Southwestern Railway Company, Debtor, and St. Louis Southwestern Railway Company, in a letter dated December 28, 1938; and by counsel for Respondent Southern Pacific Company, in a letter dated December 28, 1938. Said letters are filed herewith.

INTEREST OF *AMICUS* IN THE MATTERS IN CONTRO- VERSY.

The interest of *amicus* in this litigation is as follows:

(a) *Amicus* is counsel for Anglo-Continentale Treuhand, A. G. (hereinafter, for convenience, referred to as "Treuhand"), a Liechtenstein corporation, with no office or place of business within the United States or the territorial limits thereof. Said Treuhand is the owner of 686 First Terminal and Unifying Mortgage 5% Bonds, due 1952 (hereinafter, for convenience, referred to as "First Terminal Bonds") of Respondent Debtor, with appurtenant coupons, which First Terminal Bonds are part of the same issue which is involved upon this appeal. Said First Terminal Bonds so owned are in the principal amount, as expressed therein in guilders, of Gl. 1,708,140, and in the principal amount, as expressed therein in dollars, of \$686,000. Said Treuhand has filed a proof of claim in connection with its ownership of said First Terminal Bonds, which claim has been protested in part by Respondents herein.

Treuhand is also the owner of an unpaid portion of a judgment for \$11,198.95, rendered in a suit against Respondent Debtor, in connection with coupons detached from First Terminal Bonds of the same issue. Said Treuhand has filed a proof of claim in connection with its ownership of said judgment, which claim has been protested by two of the Respondents herein.

(b) *Amicus* also represents Mondiale Handels-und Verwaltungen, A. G. (hereinafter, for convenience, referred to as "Mondiale"); a Liechtenstein corporation, with no office or place of business within the United States or the territorial limits thereof. Said Mondiale is the owner of 389 First Terminal Bonds, with appurtenant coupons. Said First Terminal Bonds so owned are in the principal amount, as expressed therein in guilders, of Gl. 958,610, and in the principal amount, as expressed therein in dollars, of \$389,000. Said Mondiale has filed proofs of claim in connection with its

ownership of said First Terminal Bonds, which claims have been protested in part by Respondents herein.

(c) Pursuant to leave of the Circuit Court of Appeals for the Eighth Circuit, *amicus* filed a brief and participated in oral argument upon the appeal below in the instant case.

Amicus is also counsel in the following litigation, among others, involving in part questions similar to some of the questions involved upon this appeal:

(d) *Treuhand et al.* (all foreign corporations resident abroad) v. *Bethlehem Steel Company*, involving multiple currency coupons detached from multiple currency bonds issued by Bethlehem Steel Company, both similar to those at bar.

An appeal in said action was decided by the Court of Appeals (New York) January 11, 1939, holding, per curiam—two Judges dissenting—upon the authority of *Anglo-Continentale Treuhand, A. G. v. St. Louis Southwestern Railway Company*, referred to in subdivision (f), p. 4, *infra*, that the Joint Resolution does not bar payment in guilders on said coupons, and sustaining the contentions of the plaintiffs in said suit and of *amicus* herein in that connection. A petition for a writ of certiorari in said case is being presented to this Court by the losing defendant therein [see Point A(8), at p. 34 *et seq.*, *infra*].

(e) *Hydropress Handels, A. G. et al.* (all foreign corporations resident abroad) v. *Bethlehem Steel Company*, upon multiple currency coupons, similar to those at bar, detached from multiple currency bonds issued by Lackawanna Steel Company, predecessor of Bethlehem Steel Company, now pending in the Appellate Division of the Supreme Court of the State of New York; *Treuhand v. Bethlehem Steel Company*, an action pending in the Supreme Court of the State of New York, Kings County, upon “called” multiple currency bonds and coupons, similar to those at bar, issued by Bethlehem Steel Company; *Melanie Plesch et al.* (all foreigners

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resident abroad) v. *Bethlehem Steel Company*, an action pending in the Supreme Court of the State of New York, Kings County, upon "called" multiple currency bonds and coupons, similar to those at bar, issued by Bethlehem Steel Company; *Leonie Ulam et al.* (all foreigners resident abroad) v. *Bethlehem Steel Company*, an action pending in the Supreme Court of the State of New York, Kings County, upon "called" multiple currency bonds and coupons, similar to those at bar, issued by Lackawanna Steel Company, predecessor of Bethlehem Steel Company.

Presumably the fact that the Joint Resolution is not applicable to the instruments sued upon in all of the above-mentioned cases has now been established in New York State by the very recent ruling of the Court of Appeals in *Anglo-Continental Treuhand, A. G. v. Bethlehem Steel Company*, referred to in subdivision (d), *supra*, and at p. 34 *et seq.*, *infra*.

(f) *Amicus* also acted as counsel for the plaintiff in *Anglo-Continental Treuhand, A. G. v. St. Louis Southwestern Railway Company*, 81 Fed. (2d) 11, cert. den. (*sub. nom. Henwood v. Anglo-Continental Treuhand, A. G.*) 298 U. S. 655, hereinafter sometimes referred to as "St. Louis Southwestern case," involving multiple currency coupons detached from multiple currency bonds of the very issue now before this Court, and in other multiple currency litigation; and is counsel in connection with other litigation brought or about to be brought on multiple currency bonds and/or coupons.

Facts.

In order to avoid duplication, no complete statement of facts is here presented, it being assumed that Petitioner and Respondents will sufficiently state them for the guidance of the Court.

We deem it useful, however, to set out certain relevant portions of the Record.

(1) The First Terminal Bonds contain, among others, provisions as follows (R. 19-21) :

"\$1,000.	No.	\$1,000.
U. S. Gold		U. S. Gold
£205 15s. 2d. Stg.		2490 Guilders
Marks 4200, D. R. W.		5180 Francs

. UNITED STATES OF AMERICA.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY
FIRST TERMINAL AND UNIFYING MORTGAGE BOND.

"St. Louis Southwestern Railway Company, a corporation of the State of Missouri (hereinafter called the Railway Company), for value received, hereby promises to pay to the bearer, or, if registered, to the registered holder, of this bond, on the first day of January, 1952, at its office or agency in the Borough of Manhattan, City and State of New York, One Thousand Dollars in gold coin of the United States of America, of or equal to the standard of weight and fineness as it existed January 1, 1912, or in London, England, £205 15s 2d, or in *Amsterdam, Holland, 2490 guilders*, or in Berlin, Germany, marks 4200, D. R. W., or in Paris, France, 5180 francs, and to pay interest thereon, at the rate of five per cent. per annum, from the first day of January, 1912, in said respective currencies, semi-annually on the first day of January and the first day of July in each year, until payment of said principal sum, but only upon presentation and surrender, as they severally mature, of the interest coupons annexed hereto. Payment of the principal and interest of this bond will be made, **at the holder's option**, at the office or agency of the Railway Company in the Borough of Manhattan, in the City and State of New York, or *at designated offices in the foreign cities and countries above mentioned.* * * *"
(Emphasis ours.)¹

(2) The coupons appertaining to the First Terminal Bonds are in the following form (R. 22) :

"\$25.	No.	\$25.
105.05 Marks		£5 2s 10½d.
129.50 Francs		63.25 Guilders.

"On the first day of _____, 19____, St. Louis Southwestern Railway Company will pay to the

¹ Unless otherwise noted, all emphasis in this brief is ours.

bearer, upon presentation and surrender of this coupon for cancellation, at its office or agency in the Borough of Manhattan, in the City of New York, Twenty-five Dollars (\$25) in United States gold coin, or in London, England, £5, 2s. 10½d. Sterling, or in Amsterdam, Holland, 62.25 guilders, or in Berlin, Germany, 105.05 marks, or in Paris, France, 129.50 francs, being six months' interest then due upon its First Terminal and Unifying Mortgage Bond, No.....

.....
Treasurer."

(3) The Mortgage Indenture under which the First Terminal Bonds were issued contains, among others, the following provisions (R. 17-18):

"Whereas, the Railway Company, in pursuance of resolutions of its Board of Directors and of its stockholders, at meetings of said Board and of said stockholders duly convened and held in accordance with law and the by-laws of the Railway Company, has determined, for the purposes in this indenture set forth, to create its forty-year mortgage bonds, to be designated 'First Terminal and Unifying Mortgage Bonds,' limited to an aggregate principal amount of One Hundred Million Dollars (\$100,000,000), at any one time outstanding, to be coupon bonds with provision for registration as to principal, and registered bonds without coupons, to be payable on the first day of January, 1952, with interest at the rate of five per cent. per annum, payable semi-annually on the first days of January and July in each year; said bonds, both as to principal and interest, to be payable at the office or agency of the Railway Company in the Borough of Manhattan, in the City and State of New York, in gold coin of the United States of America of or equal to the standard of weight and fineness as it existed January 1, 1912 (the coupon bonds also to be payable, both as to principal and interest, at such places in the following cities in foreign countries as the Board of Directors may from time to time designate, viz.: London, England, or Amsterdam, Holland, or Berlin, Germany, or Paris, France), and both as to principal and interest without deduction for any tax or governmental charge which the Railway Company or the

Trustees may be required or permitted to pay or to retain therefrom under any present or future law of the United States of America or of any state, territory, county, municipality or other taxing authority therein; and

* * * * *

"Whereas, the First Terminal and Unifying Mortgage Coupon Bonds may be payable, at the option of the holder, both as to principal and interest, at some one or more of the following places in addition to the City of New York, and in the moneys current at such respective places of payment, at the following rates of exchange or equivalents of \$1,000, viz.: In London, England, £205.15.2 Sterling, or in Amsterdam, Holland, 2490 guilders, or in Berlin, Germany, 4200 marks, D. R. W., or in Paris, France, 5180 francs: and

"Whereas, the text of the First Terminal and Unifying Mortgage Bonds is to be in substantially the following form (the blanks in the form of registered bond without coupons to be properly filled as such bonds are issued):"

(Here follows the form of coupon bond containing the provisions hereinbefore set forth. See item (2), page 5, *supra*.)

(4) The prospectus used in the public offering and sale of the First Terminal Bonds in 1912 quoted from a letter written shortly after March 28, 1912, by the Debtor, through its President, to the Guaranty Trust Company, including among such quoted part the following (R. 133-134):

"Principal and interest of all bonds payable in gold in New York, and of coupon bonds also payable in London at £205 15s 2d sterling, or in Amsterdam at 2,490 guilders, or in Berlin at 4,200 marks, D. R. W., or in Paris at 5,180 francs, for each \$1,000 of principal and at proportionate equivalents for installments of interest."

(5) The Debtor has never maintained an office or agency in Amsterdam, Holland, for the payment of interest or principal on said First Terminal Bonds (R. 132, 159). In reply

to an inquiry of the Committee on Stock List of the New York Stock Exchange regarding payment in foreign moneys in respect of the First Terminal Bonds, the Debtor, in January, 1934, notified said Exchange that the Company had no foreign paying agent, and had not provided funds for the payment of coupons pertaining to the Bonds in any currency other than that of the United States; and on or about January 13, 1934, the office of the Secretary of the New York Stock Exchange published its Bulletin containing a statement to that effect (R. 132).

(6) The foreign flavor of the transaction is further exemplified, among other things, by the facts set forth at R. 160 and by the letter (R. 172) from the Vice-President of the Debtor to the Vice-President of the Guaranty Trust Company, as well as by the letter (R. 173) from the Vice-President of the Guaranty Trust Company to the Secretary of the Debtor.

The Questions Presented by the Petition.

1. Does the Joint Resolution of Congress of June 5, 1933 (Public Resolution No. 10, 73rd Congress, 48 Stat. 112) operate to deprive the holders of First Terminal Bonds (and coupons) of the right to exercise the election to take guilders abroad, and if it does, is such deprivation in violation of the Fifth Amendment to the United States Constitution?

2. As of what date are damages to be assessed in these proceedings, i. e., as of what date is the value of the guilder to be taken in allowing proofs of claim herein?

II.

SUMMARY OF ARGUMENT.

Preliminary Statement.

POINT A.—The Joint Resolution is not applicable to the First Terminal Bonds and coupons. It does not extend to provisions of instruments which give the obligee a right to require payment other than (a) in gold or (b) in a par-

ticular kind of coin or currency of the United States or (c) in an amount in money of the United States measured thereby; nor does it extend to such instruments or "obligations" as are payable in money other than that of the United States.

- (1) The wording of the Joint Resolution, read together with the definitions it itself contains, shows its inapplicability to the multiple currency features of the First Terminal Bonds and coupons at bar.
- (2) Only one term of one of the promises (the "gold coin" term) is impossible of performance; the resulting promise to pay lawful money and the separate promises to pay in foreign currencies remain intact.
- (3) Payment in guilders is not equivalent to payment in gold.
- (4) Neither the spirit nor the intent of the Joint Resolution affect or were intended to affect the right to demand and receive guilders. No public policy inhibits such payment.
- (5) No dislocation of domestic economy is involved in holding that the Joint Resolution does not apply to the multiple currency features of instruments payable in multiple currencies.
- (6) To hold that multiple currency clauses are condemned by the Joint Resolution would deprive the holders of First Terminal Bonds and coupons of their property without due process of law in violation of the Fifth Amendment.
- (7) The "Helyoke" Case.
- (8) Decisions of Federal and State Courts construing the Federal statute here involved as affecting multiple currency clauses.
- (9) No foreigners are parties to this proceeding or to this appeal, which is between a domestic corporate trustee on the one part, and a debtor in reorganization, its trustee, and its controlling stockholder, on the other part.

- (10) Summary Statement regarding applicability of the Joint Resolution to multiple currency clauses.

POINT B.—Accepted Conflict of Laws doctrines are applicable in bankruptcy; the laws of Holland govern the performance of the instruments at bar; and under both American and Dutch law Petitioner's contentions as to performance are correct.

- (1) The bankruptcy courts of the United States apply Conflict of Laws doctrines.
- (2) Applying accepted Conflict of Laws doctrines to the Petitioner's proof of claim, the law of Holland—the place where the contracts were by their terms to be performed,—governs.
- (3) Under both American and Dutch law, Respondents' objections to Petitioner's proof of claim, in so far as based upon the Joint Resolution, are without merit and must fall.

POINT C.—The functional approach to Respondents' interpretation of the Joint Resolution discloses the fallacy of any such interpretation.

POINT D.—Damages should be assessed as of the date of the filing and approval of the petition for reorganization.

III.

ARGUMENT.

Preliminary Statement.

In the courts below, the Respondents raised the following questions which were not passed upon by the Circuit Court of Appeals: (a) Did the corporate mortgage trustee (Petitioner herein) have the right to elect to demand and receive guilders in behalf of the First Terminal bondholders and coupon holders? and (b) Did the right to demand and receive guilders constitute a "fictitious increase" of indebtedness under the Constitution and Revised Statutes of Missouri?

The Circuit Court of Appeals did not pass upon these questions; the petition for the writ of certiorari herein does not raise these questions (although at least one is referred to in Respondents' Joint Brief in opposition thereto, pp. 7-8). and, upon the authority of *Guaranty Trust Company of New York v. U. S.*, 304 U. S. 120, they are not discussed in this brief.

If, however, this Court should deem either or both of these questions to be properly before it, *amicus* respectfully requests permission to file a supplemental brief discussing the same.

POINT A.

The Joint Resolution is not applicable to the First Terminal Bonds and coupons. It does not extend to provisions of instruments which give the obligee a right to require payment other than (a) in gold or (b) in a particular kind of coin or currency of the United States or (c) in an amount in money of the United States measured thereby; nor does it extend to such instruments or "obligations" as are payable in money other than that of the United States.

(1) The wording of the Joint Resolution, read together with the definitions it itself contains, shows its inapplicability to the multiple currency features of the First Terminal Bonds and coupons at bar.

It is a general rule that where a statute defines the meaning of words used therein, the statutory definition must prevail, regardless of what other meaning may be attributable to it by other authorities, or even by common understanding (*Fox v. Standard Oil Co.*, 294 U. S. 87). The meaning of a statute must first be sought in the language which it employs (*United States v. Standard Brewery*, 251 U. S. 210; *Lansdown v. Faris*, 66 F. [2d] 939).

The Resolution, the text of which is set forth in Appendix "A" of this brief, is clear and unambiguous. The words "obligation" and "coin and currency" are defined in Section

1(b). By inserting the definitions wherever those words appear, the Resolution properly reads as follows (the definitions being inserted by us in brackets) :

"Every **PROVISION** contained in or made with respect to any obligation [payable in money of the United States] which purports to give the obligee a right to require payment in gold or a particular kind of coin or currency [of the United States], or in an amount of money of the United States measured thereby,² is declared to be against public policy; and no such provision shall be contained in or made with respect to any obligation [payable in money of the United States] hereafter incurred. Every obligation [payable in money of the United States], heretofore or hereafter incurred, whether or not any such provision is contained therein or made with respect thereto, shall be discharged upon payment, dollar for dollar, in any coin or currency [of the United States] which at the time of payment is legal tender for public and private debts."

The scope of the Resolution is expressly limited to *obligations payable in money of the United States*. The intention so to limit the Resolution appears in the preamble (the definition also being inserted by us in brackets) :

"Whereas the holding of or dealing in gold affect the public interest, and are therefore subject to proper regulation and restrictions; and

"Whereas the existing emergency has disclosed that provisions of obligations [payable in money of the United States] which purport to give the obligee a right to require payment in gold or a particular kind of coin or currency of the United States, or in an amount in money of the United States measured thereby,² obstruct the power of the Congress to regulate the value of the money of the United States, and are inconsistent with the declared policy of the Congress to maintain at all times the equal power of every dollar, coined or issued by the United States, in the payment of debts. Now, therefore, be it * * *"

² i. e., measured by gold or by a particular kind of coin or currency of the United States.

The preamble shows beyond doubt that the statute relates exclusively to coin and currency of the United States and only to those provisions in obligations which are *payable in money of the United States*. **No mention of foreign currencies is made in the Joint Resolution.**

Guilders are not (a) gold or (b) "a particular kind of coin or currency of the United States" or (c) "an amount in money of the United States measured thereby" (i. e., measured by "a particular kind of coin or currency of the United States"); nor was gold, nor any coin or currency of the United States whatsoever, nor any amount in money of the United States measured by a particular kind of coin or currency of the United States, ever demanded; neither were any gold guilders, nor any particular kind of guilders, ever demanded by Petitioner herein.

The preamble of the Joint Resolution refers only to "PROVISIONS" contained in obligations which purport to give the obligee a right to require payment (a) in gold or (b) in a particular kind of coin or currency of the United States, or (c) in an amount of money of the United States measured thereby. It is the "PROVISIONS" which are declared to be inconsistent with the declared policy of the Congress to maintain at all times the equal power of every DOLLAR, coined or issued BY THE UNITED STATES.

In paragraph 1(a) of the Resolution proper the same thought is carried out: It is "every PROVISION" contained in or made with respect to any obligation which purports to give the obligee a right to require payment (a) in gold or (b) in a particular kind of coin or currency, or (c) in an amount in money of the United States measured thereby which "is declared to be against public policy"; and it is stated that "no such PROVISION shall be contained in or made with respect to any obligation hereafter incurred."

Respondents may seek comfort, however, from the next sentence providing that "Every OBLIGATION, heretofore or hereafter incurred, * * * shall be discharged upon payment, DOLLAR for DOLLAR, in any coin or currency which at the time of payment is legal tender for public and private debts."

It is true that the word "obligation" is sometimes used generally to refer to the instrument itself. As used in the Resolution, however, the careful phrasing—" * * * any obligation hereafter incurred [clause 1(a), first sentence] and "Every obligation heretofore or hereafter incurred" [clause (a), second sentence]—can refer only to the duty and not to the instrument itself. The instrument could not be "incurred."

"A contract is an agreement, in which a party undertakes to do, or not to do, a particular thing. The law binds him to perform his undertaking, and this is, of course, the *obligation* of his contract." (Marshall, C. J., in *Sturges v. Crowninshield* [4 Wheat. 122, 197, 17 U. S. 120, 196].)

This Court in *Norman v. Baltimore & Ohio R. R. Co.*, 294 U. S. 240, at page 299, also used the word "obligation" precisely as we contend it should be used here when it referred (at p. 299) to the "obligation" to pay in gold coin (see footnote 4, p. 15, *infra*).

Judge Learned Hand summarized this point in *Anglo-Continental Treuhand, A. G. v. St. Louis Southwestern Railway Company*, 81 Fed. (2d) 11, 12 (cert. den.³ 298 U. S. 655), as follows:

"It is true that 'a particular kind of coin or currency' means only United States coin or currency, and that 'obligation' means an obligation 'payable in money of the United States'; still it is a plausible, though to us not a persuasive, argument that 'obligation' means the instrument itself and that the resolution therefore covers all instruments which contain a promise to pay money of the United States. That would put these bonds within the resolution as to the promise to pay dollars in gold, as of course they are, but it does not advance the defendant's case a whit as to the other promises. They are within the resolution only in case its terms cover them, which they do not."

³ It is worthy of note that when certiorari was denied in the *St. Louis Southwestern* case this Court had already decided the *Norman* case and its companion cases and certiorari had already been denied in *Compania de Inversiones Internacionales v. Industrial Mortgage Bank of Finland*, 269 N. Y. 22, cert. den. 297 U. S. 705.

(2) Only one term of one of the promises (the "gold coin" term) is impossible of performance, the resulting promise to pay lawful money and the separate promises to pay in foreign currencies remain intact.

The Joint Resolution struck the words "gold coin", attached to the dollar amount, from the bonds and coupons, the resulting promise to pay lawful money and the separate promises to pay in foreign currencies remaining intact (*Nussbaum, Multiple Currency and Index Clauses*, 84 U. of Pa. L. R. 569, 571, March, 1936, commenting favorably upon the decision of the Circuit Court of Appeals in the *St. Louis Southwestern* case. In the Article Professor Nussbaum treats the subject of multiple currency clauses exhaustively and concludes that the Joint Resolution does not affect such clauses).

The wording of the Resolution itself makes clear that only the dollar "gold coin" clause of the First Terminal Bonds and coupons was intended to be affected—"Every obligation * * * shall be discharged upon payment, **dollar for dollar** * * *," not "dollar for pound," or "dollar for guilder," or "dollar for franc,"—but one dollar of lawful American money for each dollar of a particular kind of American money.

Only that single term of that particular one of the promises in the First Terminal Bonds and coupons is impossible to perform and illegal (i. e., the "gold coin" term), the resulting promise to pay lawful money and all the separate remaining promises contained in the bonds and coupons remaining unaffected. (*Norman v. Baltimore & Ohio R. R.*, 294 U. S. 240, 299).

In the *Norman* case, this Court stripped the instrument of its "gold clause" term, and left the remainder of the promise intact.⁴ Following the same reasoning, and stripping the First Terminal Bonds of the "gold clause" term, they become promises to pay \$1,000 lawful money of the

⁴ * * * the Government contends that 'the present debtor would be excused, in an action on the bonds, from the obligation to pay in gold coin' but, 'as only one term of the promise in the gold clause is impossible to perform and illegal,' the remainder of the obligation should stand and thus the obligation 'becomes one to pay the stated number of dollars' (*Norman v. Baltimore & Ohio R. R.*, 294 U. S. 240, 299).

United States in America, or, at the choice of the holder, 2,490 guilders in Amsterdam, Holland. Thereupon, upon the holder's election to take guilders in Holland, the bonds must be read as though they had originally been as follows:

"On, 19 . . . , St. Louis Southwestern Railway Company hereby promises to pay to the bearer * * * in Amsterdam, Holland, 2,490 Guilders * * *"

This simple reasoning, precisely following the course taken by this Court in the *Norman* case, clearly indicates that the Joint Resolution was not intended to extinguish, and did not in fact extinguish, the "foreign money" alternatives of the First Terminal Bonds.

The contract was legal when made. The fact that one portion of one (unexercised) alternative subsequently became impossible of performance does not destroy the obligor's duty under the (exercised) lawful alternative (*Restatement, Contracts*, Sec. 344, comment (b) ; *ibid.*, Sec. 469).

The fact that the holders of First Terminal Bonds, in addition to their right to take guilders, had the right to take dollars cannot be detrimental to them. They cannot be penalized for having secured an additional lawful (but unexercised) right, and this is the effect of Respondents' contentions.

"As soon as the guilder option is exercised, no dollar claim is left. * * * The right to a definite amount of dollars as existing prior to the exercise of the choice is irrelevant in this situation" (*Nussbaum*, 84 U. of P. L. R., *supra*, at p. 571).

See, also, *Zurich, etc., v. Bethlehem Steel Co.*, at p. 36, *infra*.

The fact that all the alternative promises were contained on one piece of paper does not change the guilder promise into one to pay in gold, or in gold dollars, or in lawful dollars. The contract created as many different obligations as there are different currencies. The media of payment being separated by disjunctives, the obligations were alternative (see *Black's Law Dictionary* [2nd Ed.], p. 843).

Furthermore, the Joint Resolution can in no way affect a contract to be performed in another country in the lawful money of that country. Legislation is presumptively territorial only and is confined to the limits over which the law-making power has jurisdiction. The Joint Resolution could not impair the payment promised to be made in Holland (*American Banana Co. v. United Fruit Co.*, 213 U. S. 347; *Sandberg v. McDonald*, 248 U. S. 185; *Bond v. Jay*, 7 Cranch. 350; *Hilton v. Guyot*, 159 U. S. 113, 163; *Anglo-Continental Treuhand, A. G. v. St. Louis Southwestern Railway Company, supra*; see also *City Bank Farmers Trust Co. v. Bethlehem Steel Co.*, dissent, at p. 38, *infra*).

The Canadian courts were confronted with a question similar to that here presented, when the Canadian dollar depreciated in terms of the United States dollar. Extensive research of American, English, French and Canadian authorities was made by Mr. Justice Maclellan in *La Corporation des Obligations Municipales Limitée v. Ville de Montreal-Nord*, 59 Cour Superieure 550 (Quebec). The plaintiff in that case was the holder of coupons of the face value of \$213 payable at the holder's option at the Banque d'Hoche-laga, in the City of Montreal, or at the office of the National Park Bank, in the City of New York, or at the Clydesdale Bank, Ltd., in the City of London. Plaintiff presented the coupons in New York and demanded American dollars which were then at a premium. Defendant, City of Montreal, refused to pay in any other than the face amount in Canadian currency. On the due date it required \$242.82 in Canadian currency to produce \$213 in American currency. The Court held that plaintiff was entitled to receive \$213 in American currency and, since plaintiff could only recover its damages in Canadian currency, judgment was given for a sum of money which would produce the amount of the coupons in American currency on the due date, to wit: the sum of \$242.82 in Canadian currency.

In *Les Commissaires D'Ecole de la Municipalite Scolaire de St. Charles v. La Societe des Artisans Canadiens-Francais*, 13 Quebec K. B. 448, suit was brought in Canada on \$30 coupons payable in gold, at the holder's option, at the chief

office of the Banque d'Hochelaga, at Montreal, or at the National Park Bank in the City of New York. The plaintiff exercised its option and on the due date presented the coupons in New York where American currency was at a premium of 13½%.

Mr. Justice Martin said (p. 449):

" * * * The unequivocal promise of the appellants expressed in plain and clear language was to pay the debt in New York and whatever the rate of exchange may have been, and it is a matter of common knowledge during the past few years it has fluctuated, it must pay at the time and place indicated in its obligation, and it does not satisfy that obligation by offering to pay in another manner, and it is rather a novel proposition to seriously contend that it can do so,"

and

"The proposition is so elementary that one would hardly think it called for extended consideration."

Mr. Justice Greenshield, concurring, said (at p. 451):

" * * * The rate of exchange which happened to prevail at the time of maturity of the obligation in no way affected the rights or obligations between the parties as contained in the contract. * * * Whether that \$30 had a greater purchasing power in a foreign country is, in my opinion, entirely outside the mark and has nothing whatever to do with the contractual obligations of the parties."

In *Jackson v. United States*, 60 Ct. of Cl. 599, plaintiff entered into a contract with the United States to erect radio towers in France. The contract provided for payment in dollars. The Government paid plaintiff in depreciated francs. Plaintiff took the francs, and sued for the difference.

The Court found the Government's contention "most singular, why the contractor was not paid as the contract provides." In rendering judgment for plaintiff, the Court stated:

"By what process of reasoning the meaning, scope and obligation clearly imposed by the provision could be perverted and ignored presents a problem of no easy solution. * * *

"The contract provided that the contractor was to receive as payment for his undertaking so many dollars, and the payment of any less sum would not, and could not, by any lawful means, discharge the obligation or relieve the liability."

By the same token, it is manifest that a sum of dollars which is insufficient to produce for Petitioner the exact number of guilders specified in the First Terminal Bonds and coupons cannot constitute a discharge of the obligation.

The language of Lord Chancellor Eldon in *Cash v. Kenyon*, 11 Vesey 316, is peculiarly appropriate:

"I cannot bring myself to doubt that where a man agrees to pay one hundred pounds in London on the first of January he ought to have that sum there upon that day. If he fails in that contract, wherever the creditor sues him, the law of that country ought to give him just as much as he would have had if the contract had been performed."

(3) Payment in guilders is not equivalent to payment in gold.

Respondents themselves concede (see their Joint Brief in opposition to certiorari, pp. 6-7) that if the First Terminal Bonds were payable in guilders only, the Joint Resolution would not apply.³ As already indicated, the only thing which the Joint Resolution accomplished was to strike the words "gold coin" from the dollar amount (*Norman v. Baltimore & Ohio R. R.*, *supra*). Such being the case, and substituting the words "lawful dollars" for "gold dollars" wherever they appear in the First Terminal Bonds and coupons (as accomplished and intended to be accomplished by the Joint Resolution), it is apparent that Respondents, on their own view of the case, must fail in their contention that the words "gold coin," attached to the dollar amount, permit the Debtor to pay that dollar amount in lieu of the number of guilders set forth in the First Terminal Bonds and coupons, even after the holder exercised his choice to take guilders.

³ After the election to take guilders, the promise at bar did in fact become one to pay guilders only.

for the simple reason that payment in guilders is not equivalent to payment in gold.

At the time when the First Terminal Bonds were issued or sold and at all pertinent times, the guilder was and is the monetary unit of Holland, and the Nederlandsche Bank was and is entitled to act as its circulation bank (R. 165). During all pertinent times the Nederlandsche Bank had the exclusive right to issue notes, and by Article I of the Law of July 18, 1904, Section 189, it is provided that so long as the Nederlandsche Bank is entitled to act as circulation bank, its notes have the quality of legal tender and lawful money; and its notes now are legal tender, except as to payments to be made by the Nederlandsche Bank itself (R. 165). The currency units of The Netherlands are provided for by the monetary laws thereof (R. 165 *et seq.*). In addition to the notes of the Nederlandsche Bank, certain silver coins have the quality of legal tender "up to any amount" (R. 165); there is not even a gold guilder (R. 165-166); and an important gold coin, the gold dukaat, is expressly provided to be "without the quality of legal tender" (R. 166). In fact, also, Holland has suspended gold exports (R. 167).

The correct view was expressed by Judge Learned Hand, speaking for the Circuit Court of Appeals for the Second Circuit in the *St. Louis Southwestern* case, at pages 11-12, as follows:

"As has been seen, the coupons contained alternative promises; the holder might demand gold dollars, pounds, guilders, marks or francs at his choice. If he chose any of the foreign currencies he could not get gold; he must be content with whatever the money of the country might be on the due date; it might then be exchangeable for all sorts of things, gold, silver, copper, land, coffee; it might be 'inconvertible,' not exchangeable for anything at all. When for example France and Germany and England went off the gold standard the defendant was relieved *pro tanto*, as it will be if Holland should similarly go off; it is therefore of no significance that she happens not to have done so in 1934 and 1935. If this were not plain enough from the absence from the promise of any requirement to pay gold, the contrast between foreign currencies and 'dollars in gold' would put it beyond doubt."

And again at page 12:

" * * * foreign money⁶ is a commodity like wheat or shoes, and lawful to buy unlike gold."

To the same effect, see *Restatement, Conflict of Laws*, Sec. 423, comment (a).

The situation in the United States with respect to the export of gold by the Federal Reserve Bank is identical with that in Holland with respect to the export of gold by the Nederlandsche Bank.

The present lawful dollar of the United States is measured in gold, 15-5/21 grains nine-tenths fine (Presidential Proclamation of January 31, 1934) although not redeemable in gold.

Under the Gold Reserve Act of 1934 and the Provisional Regulations issued thereunder (Art. IV, Secs. 28 and 29), gold may be held, transported, imported, exported, or earmarked, or held in custody for foreign or domestic account by Federal Reserve banks for the purpose, among other things, of settling international balances.

If the argument advanced by Respondents (Respondents' Joint Brief in opposition to petition for writ of certiorari, Points I and IV) prevails, then, by the same token, payment in present lawful money of the United States (Federal Reserve notes) must likewise be regarded as equivalent to payment in gold and in violation of the Joint Resolution. Of course, Respondents will not seriously argue that payment in present lawful Federal Reserve notes would constitute payment in gold or its "equivalent." However, their argument, followed to its logical conclusion, would relieve the Debtor from any payment whatever.

As a matter of fact, neither Petitioner nor the bondholders could have demanded gold guilders, or any particular kind of guilders, nor could they have obtained them even if demanded. As heretofore stated, also (p. 13, *supra*), neither gold, nor gold guilders, nor any particular kind of guilders were demanded. Payment in any kind of lawful guilders (i. e., notes of the Nederlandsche Bank, see pp. 10-20, *supra*; R. 165) would have lawfully satisfied the demand.

⁶ At bar, guilders.

The fact that guilders are not the equivalent of gold is exemplified even by the brief to the Appellate Division for the successful defendant Bethlehem Steel Company in *City Bank Farmers Trust Co. v. Bethlehem Steel Co.*, 244 App. Div. 634,⁷ where the admission is made:

"By the terms of these bonds, **dollars only were made payable in gold coin.** There was no gold provision for sterling and guilders" (at p. 40).

"The Corporation, on the other hand, was protected by the circumstance that it did its own business in the United States and derived its own income in dollars, so that **the only gold obligation in the bonds was one in respect of its own currency**, of which it would always have an adequate supply" (at p. 41).

And Southern Pacific Company (one of the Respondents at bar) made the following admission at page 77 of its brief to the Circuit Court of Appeals (9th) in the *McAdoo* case (cited and discussed at p. 39 *et seq.*, *infra*), commenting on the coupons from these very First Terminal Bonds:

"The promise was no more to pay in United States money than it was to pay in German marks, etc."

No court has ever held that payment of guilders in Holland was simply and plainly abolished by the Joint Resolution. The decisions refusing recovery for guilder value were all based upon the fact that the same instrument contained a separate, alternative, distinct (and unexercised) right to the holder of the instrument to take "gold" or "gold coin" dollars.

Inasmuch as payment *simpliciter* in guilders is admittedly not interdicted (see Respondents' Joint Brief in opposition to certiorari, p. 7), then, by the same token, a guilder option,

⁷ All such decisions except the one here under review were of lower and intermediate appellate state courts in New York, and have all been overruled by the *Zurich* and *Anglo* cases against Bethlehem Steel Company, decided by the New York Court of Appeals January 11, 1939 (see p. 34 *et seq.*, *infra*).

the exercise of which results in an identical simple obligation on Debtor's part to pay the identical guilders, must likewise be equally free from taint.

The situation is well summed up by Judge Learned Hand in the *St. Louis Southwestern* case (at p. 12) :

"Since, as we have seen, the promise to pay guilders did not 'purport * * * to require payment in gold,' the resolution does not hit it." (Asterisks not ours.)

Respondents' real grievance is that performance costs the Debtor more than it is willing to pay. Such a defense is without merit (*Norcross v. Wills*, 198 N. Y. 336, 341; *Williston on Contracts*, Vol. III, Sec. 1963).

(4) Neither the spirit nor the intent of the Joint Resolution affect or were intended to affect the right to demand and receive guilders. No public policy inhibits such payment.

"There is in the Congressional data not the slightest suggestion that Congress had considered an impairment of multiple currency clauses. Those clauses are not mentioned in the Congressional material, either directly or indirectly. * * * Thus, there is at least no documentary evidence for the assertion, which certainly requires proof, that multiple currency clauses were within the intent and spirit of the Joint Resolution." (*Nussbaum*, 84 U. of Pa. L. R., *supra*, p. 573.)

"However, diversity, and fundamental diversity, between gold clauses and multiple currency clauses appears when the situation is regarded from an economic and political standpoint" (*Nussbaum*, 84 U. of Pa. L. R., *supra*, p. 575).

In the case of multiple currency clauses, there is no justification to deny or invalidate the liability incurred. "Those obligations have always been undertaken with a clear understanding of their meaning and with no pressure of an actually inescapable custom.⁸ It cannot even be alleged that the rate of exchange risk incurred was not considered by the borrowers. For it is remarkable that in most cases the multiple currency clause was contended only as to interest,

⁸ Such as prevailed with respect to gold coin clauses (discussed at p. 576).

not as to principal. Such a limitation will not be found in any gold bond. That the Joint Resolution cannot be regarded as having simply and plainly abolished the multiple currency clauses is clearly recognized both by the debtors invoking the Resolution and by the New York court"—referring to the now overruled decision in *City Bank Farmers Trust Co. v. Bethlehem Steel Co.*, *infra*, p. 37—(Nussbaum, 84 U. of Pa. L. R., *supra*, pp. 576-577).

Manifestly, had Congress intended to legislate with respect to multiple currencies, it would have included them in the definitions contained in the Joint Resolution. The omission is most significant, since there has been no hesitancy on the part of Congress to legislate specifically with respect to any matters deemed by it to be against public policy.

"Equally, we should have no warrant in supposing that when the obligation was to pay foreign money, it was any nearer to the putative purposes of Congress than if it was to do anything else" (*St. Louis Southwestern* case, at p. 12).

That multiple currency promises were never intended to come within the condemnation of the Joint Resolution is further evident from Executive Order No. 6560 promulgated January 15, 1934, by the President by virtue of Section 5(b) of the Act of October 6, 1917 (40 Stat. 411), as amended by Section 2 of the Act of March 9, 1933, prescribing regulations for the investigation, regulation and prohibition of transactions in foreign exchange and transfers of credit.

Certain transactions were prohibited except under license, provided, however, that

"foreign exchange transactions and transfers of credit may be carried out *without a license* for (a) normal commercial or business requirements * * * (c) the fulfillment of legally enforceable obligations incurred prior to March 9, 1933."

The First Terminal Bonds and coupons were issued in 1912. Servicing of a funded debt is surely a "normal commercial or business requirement." Payment of the First Terminal Bonds and coupons even falls within the express permission of these regulations.

Guilders are legal tender of The Netherlands and an obligation payable in that country in guilders can be discharged only by payment of Dutch currency, or of damages in this country in lawful American dollars.

"The law of the place of performance determines the medium of payment in which a contract to pay money is to be performed." (*Restatement, Conflict of Laws*, Sec. 364.)

The law of the place of performance determines the manner of performance, as well as the excuse for non-performance (*Restatement, Conflict of Laws*, Sec. 358(a) and (e): *Andrews v. Pond*, 12 Peters 65, 77).

Articles 1308, 1309, 1311, 1312 and 1313 of the Dutch Civil Code provide that in the case of alternative obligations, where the choice has been left to the creditor, if one of the two things has perished or can no longer be delivered, the creditor is entitled to the other.

Such, also, is our own law:

"Where a contract provides that one of two alternatives shall be performed by the promisor, the fact that one alternative is, or becomes, impossible does not excuse the promisor from performing that which remains possible * * *" (*Williston on Contracts*, Sec. 1961).

Using the words of Judge Hand in the *St. Louis Southwestern* case (at p. 13),

"Congress either forbade the enforcement of such promises, or it did not. We will not try to recast it altogether, excepting alien obligees though, its language covers them equally with citizens. There is a limit to the power of courts to mould the language of a statute in the interest of even the clearest immanent purpose; and we are not here certain of the existence of such a purpose."

Federal and State courts have both permitted recovery for the full dollar amount of dollar instruments against contentions that by the laws and currency restrictions of the foreign

countries of which the defendants were citizens such payments might not lawfully be made and that such payments imposed hardship upon the debtors (*Central Hanover Bank & Trust Co. v. Siemens & Halske Aktiengesellschaft et al.*, 15 F. Supp. 927 [Dist. Ct., S. D. N. Y.], aff'd on opinion below 84 F. [2d] 993 [C. C. A. 2d], cert. den. 299 U. S. 585; *Perry v. Norddeutscher Lloyd [Bremen] [North German Lloyd]*, 150 Misc. 73 [N. Y.]; *Glynn v. United Steel Works Corporation*, 160 Misc. 405 [N. Y.]; *Marks v. United Steel Works Corporation*, 160 Misc. 678 [N. Y.]; *Sheppard v. Hamburg-Amerikanische Packetfahrt Actien-Gesellschaft*, N. Y. Law Journal, Mar. 14, 1934, p. 1232 [Collins, J.] [not elsewhere reported]; *Lamm v. United Steel Works Corporation*, 166 Misc. 465 [N. Y.]; *Goodman v. Deutsche Atlantische &c.* and *Douglas v. Same*, 166 Misc. 509 [N. Y.]; *Mayer v. Hungarian Commercial*, No. L. 7424, U. S. D. C., E. D. N. Y., decided July 7, 1934—Galston, J. [not elsewhere reported]; *Pan-American Securities Corporation v. Fried. Krupp*, 6 N. Y. Supp. [2d] 993).

Respondents have referred disparagingly to the fact that First Terminal bondholders might make a speculative profit if the claim for guilders were to be allowed (Respondents' Joint Brief in opposition to petition for writ of certiorari, p. 19). In answer, we can use no better language than that used by Mr. Justice Steinbrink in *Pan-American Securities Corporation v. Fried. Krupp*, cited *supra*. The learned Justice had before him an instrument issued by a German corporation payable in dollars in America. The German Devisen Laws were pleaded as a defense, and defendant also urged that plaintiff intended to make a speculative profit by the purchase of the securities.

Finding for the plaintiff upon a motion for summary judgment, the Court held, among other things, that the alleged fact that the plaintiff seeks to make a speculative profit is no concern of the court, "for the answer to such arguments is that if the plaintiff seeks to make a huge speculative profit, so, too, the defendant seeks to make a larger profit by compelling the plaintiff to accept payment in a depreciated currency."

Public policy also permits recovery in the United States upon instruments, payment of which is lawful by the law of the place of performance. There is no public policy restricting or prohibiting the payment of guilders, either in the United States or abroad.

(5) No dislocation of domestic economy is involved in holding that the Joint Resolution does not apply to the multiple currency features of instruments payable in multiple currencies.

All parties to the instant litigation admit that no dislocation of domestic economy is involved by sustaining the validity of the multiple currency clauses.

Thus Petitioner, at page 29 of its brief in support of its petition for a writ of certiorari, makes the following correct statement:

"Multiple currency clauses, unlike gold clauses, applied to a very limited number of contracts and security issues in the year 1933. While the gold clause has been estimated to have been in contracts for seventy-five billions of dollars or more (see *Norman v. Baltimore & Ohio R. Co.*, 294 U. S. 240, 313), foreign currency options do not amount to 1% of this sum. See Nussbaum, *Multiple Currency and Index Clauses*, 84 U. of Pa. Law Rev. 569, 575-6 (March, 1936).¹"

And Respondents, at page 17 of their Joint Brief in opposition to petition for writ of certiorari, make the following statement:

"The importance of the precise question at issue, viz., the application of the Joint Resolution to United States money contracts containing foreign money options, has become of somewhat lesser importance in the last few years. A number of bond issues having such options have been redeemed recently, and there are only two uncalled issues, in addition to the St. Louis

¹ According to the computation of the Debtor's Trustee, at p. 6, in his unsuccessful petition for certiorari in *Henwood, Trustee, v. Anglo-Continental Trenhand, A. G.*, 298 U. S. 655, only \$90,000,000 face amount of outstanding bonds have alternative provisions for payment in moneys of countries remaining on the pre-war gold standard. This is a little more than 1/10 of 1% of the aggregate of bonds containing the gold clause."

Southwestern Railway Company issue, which are payable in money of the United States, or optionally in a foreign money now at a premium, viz., an issue of Southern Pacific Company and an issue assumed by Niagara, Lockport and Ontario Power Co. Also some bonds of this character of the Bethlehem Steel Company, which have been called for payment, are still outstanding. Moreover, the foreign moneys in which these issues are optionally payable, Dutch guilders and Swiss francs, now command a smaller premium than they did several years ago."

In the *Norman* case this Court did not purport to pass upon multiple currency instruments, payable abroad in a foreign monetary unit. Nowhere in the decision is there any indication that the Court entertained the view that the Joint Resolution condemned multiple currency payments—multiple currency clauses were not before the Court for construction. In the argument for the Government, repeated references are made only to the "gold clause" (i. e., at pp. 273-274-275).

The Southern Pacific issue referred to by Respondents as containing multiple currency clauses, amounts to a total, as expressed in dollars, of less than \$25,000,000, out of a total funded debt of the Southern Pacific system of upwards of \$700,000,000 (Moody's Manual of Railroads, 1938) and the bonds of the Niagara, Lockport and Ontario Power Company containing multiple currency clauses amount to a total, as expressed in dollars, of \$2,605,000, out of a total funded debt of \$23,816,500 (Moody's Manual of Public Utilities, 1938).

This Court said in the *Norman* case (at p. 312):

"If the gold clause applied to a very limited number of contracts and security issues, it would be a matter of no particular consequence * * *."

Therefore, Mr. Chief Justice Hughes' statement in the *Norman* case as to the "dislocation of domestic economy" is not applicable here.

Inasmuch as these multiple currency clauses apply "to a very limited number of contracts and security issues," there exists no economic justification for holding that the Joint Resolution condemns or prohibits multiple currency clauses.

(6) To hold that multiple currency clauses are condemned by the Joint Resolution would deprive the holders of First Terminal Bonds and coupons of their property without due process of law in violation of the Fifth Amendment.

The Mortgage Indenture (R. 17 *et seq.*) conveys to the corporate mortgage trustees various specific property, as therein described, as security for the payment of the First Terminal Bonds and coupons. The mortgage is dated January 1, 1912, more than twenty-one years prior to the passage of the Joint Resolution.

It must be remembered that this Court is here called upon to construe the Joint Resolution in a bankruptcy proceeding.

"The bankruptcy power, like the other great substantive powers of Congress, is subject to the Fifth Amendment" (*Louisville Joint Stock Land Bank v. Radford*, 295 U. S. 555, at p. 589).

Under the Bankruptcy Act, though Congress may discharge the debtor's personal obligation, it cannot take, for the benefit of the debtor, rights in specific property acquired prior to the enactment of amendatory Section 77 of the Bankruptcy Act. As was said by this Court in the *Louisville Joint Stock Land Bank* case, *supra*, at page 580:

"This right of the mortgagee to insist upon full payment before giving up his security has been deemed of the essence of a mortgage."

And again (at p. 602):

"* * * private property shall not be thus taken even for a wholly public use without just compensation."

The "taking" here attempted by Respondents is for a private and not for a public use. To destroy the bondholders' right to demand and receive guilders in Amsterdam. Hol-

land, or damages for Debtor's failure to pay the same, would operate to take their "rights in specific property which are of substantial value" (*id.*, at p. 601) from one person and give them to another, in violation of the Fifth Amendment of the Constitution.

One of the Respondents, Southern Pacific Company, has stated that it appears herein as a creditor (*Joint Brief of Respondents in opposition to certiorari*, p. 24)—presumably to indicate a disinterested position. It is a matter of record in the bankruptcy court and in the Interstate Commerce Commission, that the Southern Pacific Company is the owner of 87% of the capital stock of the Debtor (see, also, Moody's Manual of Railroads, 1938), and any impairment of the rights of the holders of First Terminal Bonds, or diminution of their claims, would have the direct result of enhancing the value of the interest of the stockholders in the property of the Debtor at the expense of the First Terminal bondholders.

The Joint Resolution should, if possible, be construed so as to avoid the unconstitutional result of confiscating the property of the First Terminal bondholders principally for the benefit of one of the Respondents. To this end, that construction thereof which will save the Resolution should be adopted (*National Labor Relations Board v. Jones & Laughlin, etc.*, 301 U. S. 1).

As stated by Mr. Justice Holmes in *United States v. May*, 241 U. S. 394, 401 (1916):

"A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score."

See also *United States v. Delaware & Hudson Co.*, 213 U. S. 366, 407 (1909); *Horey v. De Long, Hook & Eye Co.*, 211 N. Y. 420, 429 (1914).

See further *Harc, American Constitutional Law* (1889), Vol. II, pp. 1233-1239, from which we quote as follows:

"It results from these considerations that the power of Congress over the currency is supreme. It has no limit, because none is set to it in the Constitution. * * *

*"The parties might have placed themselves beyond the reach of Congress by stipulating for payment in wheat * * * and submitting to the uncertainty, delay, and other inconveniences inseparable from such a mode of contracting; among which may be mentioned * * * the necessity for calling a jury to assess the damages. * * * If the question of value is left to the government by bargaining for money, * * * the parties must submit * * *. This will be true, even when a particular kind of money is contracted or, so long as the contract is for lawful money of the country, because the limitation will be rejected as inconsistent with the general design of the contract. That a particular must yield to a general intent, when both cannot stand consistently with each other, or with the law, is a well-settled rule in the construction of grants and contracts; and no repugnancy can be greater than that which must result from an attempt to unite the different and irreconcilable attributes of money and merchandise, of bullion and coin, * * * (citing *Shoenberger v. Watts*, 5 Phila. 51, 56 [1882])."*

Thus the constitutional powers of Congress cannot be expanded to condemn payment of guilders abroad nor to deprive the holders of these instruments of their express contract and property rights in the manner contended for by respondents.

If, however, the filing and approval of the petition in reorganization be deemed to "freeze" the rights of the First Terminal bondholders, and to deprive them of the right of election, due compensation must be given to them for such deprivation (*Central Trust Company of Illinois v. Chicago Auditorium Association*, 240 U. S. 581; *Maynard v. Elliott*, 283 U. S. 273; *Dunlop v. Baker*, 239 Fed. 193 [C. C. A. 4th], cert. den. 242 U. S. 650; *Security-First National Bank v. Rindge Land & Navigation Co.*, 85 Fed. [2d] 557 [C. C. A. 4th]), and such compensation is represented by the value of the guilder on December 12, 1935 (see also Point D, *infra*).

(7) The "Holyoke" Case.

Respondents will without doubt urge upon this Court (as they did at page 9 of their Joint Brief in opposition to the petition for writ of certiorari herein) that *Holyoke Water Power Co. v. American Writing Paper Co.*, 300 U. S. 324 (hereinafter referred to as the "*Holyoke* case"), is persuasive of the issues here presented.

An examination of that case shows at once that *no question of multiple currencies was even remotely involved.*

Certain leases were executed by the Water Power Company to the Paper Company.

"By concession the following form has been accepted as typical: the grantee shall yield and pay unto the grantor as rent 'a quantity of gold which shall be equal in amount to Fifteen Hundred (\$1500) Dollars of the gold coin of the United States of the standard of weight and fineness of the year 1894, or the equivalent of this commodity in United States currency' " (p. 333).

Applying the Joint Resolution, this Court held (p. 333) that the obligation was for the payment of money and not for the delivery of gold as upon the sale of a commodity, and that (p. 337) the contract, being for the payment of **money of the United States** measurable in gold, "is within the letter of the Joint Resolution."

Our contentions at bar are entirely consistent with the decision thus reached. Applying the definitions appearing in the Joint Resolution itself, it appears that one alternative of the contract in the *Holyoke* case was for the payment of a quantity of "gold" which should equal a specific amount of "a particular kind of coin or currency of the United States," and therefore came within the specific condemnation of the Joint Resolution. The other alternative provided for in the *Holyoke* lease was for the payment of "a particular kind of coin or currency of the United States, or in an amount in money of the United States measured thereby," and therefore also quite properly came within the condemnation of the Resolution.

This Court's approach to the problem in the *Holyoke* case is set forth at page 340 of the opinion:

"If the currency⁹ to be paid by the lessee is to be the equivalent of gold, and if the gold is to be the equivalent of a stated number of gold dollars of a particular weight and fineness, then *the covenant to pay the currency*⁹ is tantamount to a covenant to pay the dollars, and dollars of the stated standard."

It seems apparent by the above quotation from the *Holyoke* decision that this Court condemned only that "*covenant to pay the currency*"⁹ (of the United States) which was equivalent to the "gold," or the "particular kind" of currency, referred to in the lease. This Court even went so far as to indicate that if the covenant had even been one to pay *gold as a commodity* (if the recipient were engaged in an art requiring gold) it would not have been condemned.

In fact, as indicating that this Court had no intention of even remotely touching the multiple currency question, as to which it had denied certiorari in the *St. Louis Southwestern* case only a short time previously, we quote the following from the opinion at pages 335-336:

"Long ago it was said by a distinguished member of this court, commenting upon a different statute, but one analogous in purpose: 'If the contract is for the delivery of a chattel or a specific commodity or substance, the law does not apply * * *.' (*The Legal Tender Cases*, 12 Wall. 457, 566.)"

Paraphrasing the words of Mr. Justice Cardozo, the contract at bar is for "a specific commodity or substance" (Dutch guilders) and the Joint Resolution does not apply.

In exact line with the reasoning in the *Norman* case—to the effect that *only one term* of the promise was impossible to perform and illegal (i. e., the "gold coin" term), all the remaining promises remaining unaffected,—this Court, in reaching its conclusions in the *Holyoke* case, stripped the instrument of its "gold" and "gold coin" TERMS, the remain-

⁹ Under the definitions in paragraph 1(b) of the Joint Resolution, the "currency" to which the Court refers must be deemed to be "coin or currency of the United States."

der of the instrument remaining intact and unaffected, and becoming one to pay the stated number of dollars.

In exact compliance with the Joint Resolution, also, this Court in the *Holyoke* case ordered that the obligation be discharged "DOLLAR FOR DOLLAR"—a dollar of a "particular kind" for a present lawful dollar—specifically as provided for in the Joint Resolution.

Accordingly, on analysis, not only is the *Holyoke* case incapable of the application to the case at bar for which Respondents contend, but, properly read, and particularly in the light of Judge Hand's opinion in the *St. Louis Southwestern* case, it actually, by indirection, supports our position that the Joint Resolution does not apply to multiple currency clauses.

(8) Decisions of Federal and State Courts construing the Federal statute here involved as affecting multiple currency clauses.

The application of the Joint Resolution to multiple currency clauses has been the subject of litigation in four jurisdictions, viz., the State courts of New York, the Federal courts in California, the Federal courts in New York, and the Federal courts in Missouri (the latter in the instant case, and in certain other claims on the part of individual bondholders, referred to in subdivisions (a) and (b) on page 2, *supra*).

Save and except in the instant case, the governing decisions in all jurisdictions sustain the proposition that the Joint Resolution is not applicable to the multiple currency features of the promises, and does not prohibit or bar the payment abroad of the specific number of foreign monetary units specified in the instruments, even though, in the same piece of paper, there is contained an unexercised option to take gold dollars.

(a) The law in the State of New York has been settled as recently as January 11, 1939, by the opinion of the Court of Appeals of that State, to the effect that the Joint Resolution is not applicable to multiple currency clauses (*Zurich Gen.*

eral Accident & Liability Insurance Co. v. Bethlehem Steel Co., 164 Misc. 498, aff'd 254 App. Div. 839, reversed ... N.Y. ... [1939]; and *Anglo-Continental Treuhand, A. G. v. Bethlehem Steel Co.*, 6 N. Y. Supp. [2d] 334, modified, and affirmed as modified, 254 App. Div. 844, judgment of Appellate Division reversed and that of Special Term affirmed, with costs, ... N. Y. ... [1939]). Petitions to this Court for the granting of writs of certiorari have been presented by the losing defendants in both said cases.

The *Zurich* case involved multiple currency coupons from an issue of multiple currency bonds issued by Lackawanna Steel Company, predecessor of Bethlehem Steel Company, similar to those at bar, i. e., payable in gold dollars in the United States of America, or in a specified number of pounds sterling in England, or in a specified number of guilders in Holland, or in a specified number of marks in Germany, or in a specified number of francs in France, Belgium or Switzerland.

The plaintiff in that case, a foreign corporation, demanded payment in Switzerland of the number of Swiss francs set forth in the coupons, but payment was refused. The court at Special Term granted summary judgment for the face amount of the *dollars* set forth in the coupons, and dismissed the complaint as to the balance; the Appellate Division affirmed (two Justices dissenting) and, as stated above, the Court of Appeals reversed the Appellate Division and the lower court, and granted plaintiffs' motion for summary judgment for the full value of the Swiss francs sued upon.

The following appears in the majority opinion:

"The question is whether, on the facts of this case, the Joint Resolution is applicable to this obligation to pay the foreign currency to a foreign corporation in a foreign country. The courts below have held that it is. We are convinced of the correctness of the contrary result flowing from the decision of the Circuit Court of Appeals, Second Circuit, in *Anglo-Continental Treuhand, A. G. v. St. Louis Southwestern Railway Co.* (81 Fed. 2d, 11,—1936), wherein the facts were the same [as] at bar except that payment was made in guilders at Amsterdam instead of francs at Zurich. * * *

“On the facts of this case, the obligation was not payable in ‘money of the United States’ but in foreign currency and therefore the Joint Resolution is not applicable. The obligation might have become payable at New York in United States money, but the fact is that it did become payable in Switzerland in Swiss currency.”

In *Anglo-Continentale Treuhand v. Bethlehem Steel Co.*, argued and decided concurrently with the *Zurich* case, the defendant's answer had been stricken and summary judgment had been rendered at Special Term for the full amount sued for, based on defendant's refusal to pay in Amsterdam the specified number of guilders set forth in multiple currency coupons detached from multiple currency bonds of Bethlehem Steel Company, similar to the Lackawanna Steel Company bonds and coupons involved in the *Zurich* case. The Appellate Division modified the judgment, by reducing the same to the face amount of the *dollars* set forth in the coupons, though allowing interest from the date of presentation, and, as so modified, affirmed the judgment (a somewhat anomalous holding, the effect of which was to compel plaintiffs to accept the face amount of the *dollars* in the United States set forth in the coupons, but to compel defendant to pay interest for its refusal to pay the guilders demanded in Holland by the plaintiffs). The Court of Appeals reversed the judgment of the Appellate Division and affirmed the judgment of the Special Term, with costs to the plaintiffs.

The following appears in the *per curiam* opinion:

“This action is the same in principle as the *Zurich Insurance Company* case decided herewith. In the present litigation the trial justice granted plaintiffs' motion for summary judgment for the amount demanded in the complaint but the Appellate Division modified by reducing the judgment to amounts to conform with the theory that the Joint Resolution of Congress required payment of these coupons in foreign currency in a foreign country based upon the value of United States dollars as depreciated. The judgment of the Appellate Division should be reversed and that of the Special Term affirmed, with costs, etc.”

The law in New York thus having been settled by the Court of Appeals, all decisions of the Appellate Division or of the Supreme Court, from which contrary inferences might be drawn, may thereby be deemed to be overruled.¹⁰

The Court of Appeals opinions can now be taken as adopting Mr. Justice Merrell's dissent in *City Bank Farmers Trust Co. v. Bethlehem Steel Co.*, 244 App. Div. 634. In that case the majority held that a domestic¹¹ trustee could not recover the value of guilders upon multiple currency coupons similar to those at bar but was limited in its recovery to the face dollar amount of the coupons.

Mr. Justice Merrell vigorously dissented (see pp. 640-641 of 244 App. Div.), stating, among other things:

"The resolution is carefully limited to obligations 'payable in money of the United States,' and payable in 'a particular kind of coin or currency of the United States.' There is no intention on the part of the Congress to extend the resolution to obligations payable in foreign countries in a foreign currency. The absence of any such intention is clearly shown by the preamble of the resolution, which stated as follows:

* * * * *

¹⁰ *City Bank Farmers Trust Co. v. Bethlehem Steel Co.*, 244 App. Div. 634; *Anglo-Continental Treuhand, A.G. v. Southern Pacific Co.*, 165 Misc. 562 (N. Y.), affirmed without opinion 251 App. Div. 803, motion for reargument or leave to appeal to Court of Appeals denied 251 App. Div. 885; *Hydropress Handels, A.G. v. Lackawanna Steel Co.*, New York Law Journal, May 7, 1938, page 2221; also the decision of the Appellate Division and of Mr. Justice Rosenman in the *Zurich* case and of the Appellate Division in the *Anglo* case, both discussed at page 35 *et seq.* It is worthy of note that in all of the aforesaid opinions (except in the *Zurich* case below) language appears indicating that foreigners have the right to recover foreign moneys abroad on multiple currency clauses.

Lower court decisions in New York State which now remain in harmony with the decisions of the Court of Appeals, and which may be regarded as having validity, are: *Mondiale Handels-und Verwaltungs* and another v. *Bethlehem Iron & Steel Corporation*; *Nederlandsche Middenstandsbank N. V.* and others v. *Bethlehem Steel Co.*; *Zurich General Accident & Liability Ins. Co. v. Bethlehem Iron & Steel Co.* (all decided by Mr. Justice Hofstadter and all reported in New York Law Journal, June 13, 1936).

The judgments in all three last-mentioned cases were paid in full with interest, and they, together with the *St. Louis Southwestern* case, constitute the only final, unappealable holdings on the question—all to the effect that the Joint Resolution does not affect the multiple currency features of the instruments sued upon.

¹¹ According to the majority opinion (p. 636), it was not contended that the holders of the coupons, who were subjects of England and Holland, respectively, were governed by the terms of the Joint Resolution.

"The resolution itself is clear and unambiguous and should not be extended by interpretation or construction to include any reference to obligations other than those which are payable in money of the United States. Under well-recognized constitutional limitations the Congress had no power to extend the scope of the resolution so as to give it extraterritorial effect. * * * Neither the power of the Congress to regulate the value of the money of the United States nor 'the declared policy of the Congress to maintain at all times the equal power of every dollar, coined or issued by the United States, in the markets and in the payment of debts,' has any application to the contract here involved, which contract provided expressly for the payment of the coupons in guilders at Amsterdam, Holland, in case the holder exercised its option to present the same for payment there. In adopting this resolution the Congress recognized that it could not make this law effective in a foreign country. The Congress must have recognized that its declaration as to the American public policy had nothing to do with contracts to be performed abroad."

(b) *Anglo-Continental Treuhand, A. G. v. St. Louis Southwestern Railway Co.*, 81 F. (2d) 11, cert. den. 298 U. S. 655, is the decision referred to and relied upon by the Court of Appeals in settling the law in New York to the effect that the Joint Resolution does not apply to multiple currency clauses.

In that case, Judge Learned Hand, writing for a unanimous Circuit Court of Appeals for the Second Circuit, in an action upon coupons detached from bonds of the very issue now before this Court, expressly rejected the reasoning of the majority of the Appellate Division in the *City Bank Farmers Trust Company* case (*infra*), and adopted the reasoning of Judge Lindley in *McAdoo v. Southern Pacific Co.* (*infra*) and the reasoning of the dissenting opinion of Mr. Justice Merrell in the *City Bank* case, using the following language:

"Judge Lindley in *McAdoo v. Southern Pac. Co.* (D. C.), 10 F. Supp. 953, took our view: the Appellate Division of the Supreme Court of New York by a majority of four to one decided otherwise. *City*

Bank Farmers Trust Co. v. Bethlehem Steel Co., 244 App. Div. 634, 280 N. Y. 494. We are not persuaded by the reasoning of the majority."

Other language from this well-reasoned opinion is elsewhere quoted in this brief.

The judgment in the *St. Louis Southwestern* case was paid in full with interest, and up to this time this is the only case which has been litigated to the ultimate court to which it could possibly go.

(c) As indicated, Judge Hand's excellent opinion, cited with approval *McAdoo v. Southern Pacific Co.*, 10 Fed. Supp. 953 (N. D., Cal., S. D.; reversed, solely on jurisdictional grounds, by the Circuit Court of Appeals, 9th, and remanded because the amount involved in the suit was less than \$3,000, 82 F. [2d] 121). That was a suit for a declaratory judgment by a *domestic* upon coupons similar to those at bar, issued by one of the companies in Respondent Southern Pacific's railroad system. Judge Lindley, in a convincing opinion, held that even a domestic was entitled to recover the value of foreign moneys if payment in such foreign moneys was selected by him.

In referring to *Norman v. Baltimore & Ohio R. Co.*, *supra*, Judge Lindley said (at p. 953):

"In the Gold Clause cases, *Norman v. Baltimore & O. R. Co.*, 294 U. S. 240; * * * the court was dealing with legislation that expressly forbade contracts payable in gold coins of the United States. There, the court said: 'The Congress has enacted an express interdiction' [citations]. The question with which the court here is primarily concerned is whether that interdiction expressly or impliedly includes contracts payable in guilders of the Netherlands or francs of Switzerland."

and, in discussing the Joint Resolution, said at page 954:

"The unambiguous provision of the resolution then, is to declare unlawful clauses requiring payment in gold of any obligation 'payable in money of the United States,' in 'coin or currency of the United States.' The act by its own language carefully limits its force

to 'obligations payable in money of the United States,' and purports to deal only with 'coin or currency of the United States.' The bar of illegality, by its own terms, is defined and limited in effect. Congress was dealing with contracts calling for payment in gold coin of the United States; not with contracts payable in money of foreign countries. The preamble of the resolution so indicates. If we give full force and effect to the unambiguous language employed, we are unable to point out any words that disclose any intent to extend the prohibition further than that language clearly indicates. Consequently, the rights and liabilities of the parties in the contracts under consideration, not being within the legislation, are the same as if the resolution had never been adopted."

(e) In the face of Judge Lindley's decision in the *McAdoo* case, and of the opinion in the *St. Louis Southwestern* case, the Circuit Court of Appeals in the instant case (*Guaranty Trust Co. v. Henwood*, 98 F. [2d] 160 [C. C. A. 8th], cert. granted — U. S. —) placed a different construction upon the Joint Resolution, apparently—we believe erroneously—basing its decision (in part at least) upon the circumstance that this railroad obligor is in reorganization.

Amicus respectfully submits that the reasoning of the Court below was in error, and that the reasoning of Judge Hand in the *St. Louis Southwestern* case and of the New York Court of Appeals in the *Zurich* and *Anglo* cases, truly and correctly construes the Joint Resolution so far as concerns its impact upon the multiple currency clauses contained in the First Terminal Bonds and coupons.

It may be noted, also, that the Court of Appeals, in the *Zurich* and *Anglo* cases, had before it the then most recent decision (that of Judge Stone in the instant case), as well as all the preceding decisions in its own and the other jurisdictions in which this question had come up for decision; nevertheless, it chose what we believe to be the correct construction, viz.: that found in the dissenting opinion of Mr. Justice Merrell, in the opinions of Judge Lindley, Judge

Hand and Mr. Justice Hofstadter, and in the opinion of the dissenting Justices in the Appellate Division in the *Zurich* and *Anglo* cases; and it is the construction of the Joint Resolution, as applied to multiple currency clauses, thus recently re-enunciated by the New York Court of Appeals which we now urge upon this Court.

It is to be expressly noted, also, that in the *St. Louis Southwestern* case plaintiffs expressly conceded (see pp. 35-36 of appellees' brief in the Circuit Court of Appeals; p. 3 of respondent's brief in opposition to petition for writ of *certiorari*) that the instruments there sued upon were acquired after the passage of the Joint Resolution, but judgment was nevertheless granted to the plaintiffs. The same express concession was made by the plaintiffs in the *Anglo* case recently decided in their favor by the New York Court of Appeals (see p. 8 of their brief in that Court).

(9) No foreigners are parties to this proceeding or to this appeal, which is between a domestic corporate trustee on the one part, and a debtor in reorganization, its trustee, and its controlling stockholder, on the other part.

Amicus respectfully calls the attention of this Court to the intimations in various decisions (see footnote 10, p. 37, *supra*) that foreigners may be entitled to recover the value of foreign monetary units, whether or not domestics may be entitled to do so. The clients represented by *amicus* are all foreigners. The mere circumstance that some First Terminal bondholders are aliens does not deprive them of their constitutional rights. *Wong Wing v. United States*, 163 U. S. 228; *Russian Volunteer Fleet v. United States*, 282 U. S. 481.

If the issues as framed upon this appeal are decided in favor of the contentions of Petitioner, the rights of foreign holders of First Terminal Bonds and coupons to demand and receive foreign monetary units will be sustained; on the other hand, if Question 1 (p. 8, *supra*) is decided by this Court against the Petitioner, the rights of such foreign holders to demand and receive foreign monetary units will remain undetermined by this Court.

Amicus respectfully further calls the attention of this Court to the fact that no bondholders who have filed independent proofs of claim herein are parties hereto, so that any rights such bondholders may have in their individual capacity—as, for instance, a claim of *res adjudicata* by Anglo-Continentale Treuhand, A. G.—will likewise remain undetermined upon this appeal.

(10) Summary Statement regarding applicability of the Joint Resolution to multiple currency clauses.

The Joint Resolution not being applicable, the question, therefore, resolves itself into a simple problem in contracts.

“When a contract involves a promise to do one thing or another at the option of either party the place of performance is undetermined until the option is exercised, and it then becomes the place of performing the promise which is chosen by the party having the option” (*Restatement, Conflict of Laws*, Sec. 356[1]).

The number of guilders is specifically set out in the bonds and coupons. Bondholders who elect to receive the same could get no lesser or larger number of guilders than set forth therein despite the fluctuations of the various currencies. If a holder chose francs, for instance, he could get no more units of that currency because francs had depreciated. Respondent's reasoning would compel the Debtor to pay \$1,000 for each bond in America, even though a French citizen, for reasons of his own, might have elected to take 5,180 francs in Paris, worth about 25% of the dollar amount. Such a result shows the fallacy of any such argument.

Respondents endeavor to create an ambiguity by torturing the bonds and coupons into reading as though they are instruments payable only or primarily in “gold dollars,” whereas in fact, by the exercise of the choice of guilders in Holland, they become payable *solely* in a fixed number of such guilders, not measured by nor in relation to (a) gold or (b) a particular kind of coin or currency of the United States or (c) an amount in money of the United States measured thereby.

This Court may take judicial notice of the fact that all bonds and coupons are drawn by the issuing corporation and that the holders thereof had no part in the composition thereof.

We respectfully submit that there is no ambiguity; nevertheless, if any exists, the instruments must be construed against the Debtor, whose words they are. *Williston on Contracts*, Vol. II, Sec. 621 (p. 1203), and cases cited in note; *Restatement, Contracts*, Sec. 236(d); *id.*, Sec. 325(2); *Rothschild v. Rio Grande Western R. Co.*, 84 Hun 103, 109 (1st Dept., 1895), *aff'd* 164 N. Y. 594.

Respondents may argue that because instruments containing provisions for payment in multiple currencies may be or are included in the \$75,000,000,000 of "gold clause" bonds referred to in the *Norman* case, and because it was decided in *Campania de Inversiones Internacionales v. Industrial Mortgage Bank of Finland*, 269 N. Y. 22, cert. den. 297 U. S. 705, that a "gold clause" provision in a bond is discharged by payment of lawful money, those simple (inapplicable) circumstances permit Debtor to discharge the chosen *foreign currency* provision in the instruments at bar by payment in American dollars at the face amount set forth.

The *Norman* and *Inversiones* cases dealt only with that limb of the instruments which provided for payment in gold coin. To the extent that the instruments sued upon at bar provide for payment in gold coin, they of course come within the condemnation of the *Norman* and *Inversiones* cases—in other words, to the extent (but no more) that the instruments contain a provision for payment in gold coin, the obligation to pay lawful money is substituted for the obligation to pay the gold coin. But at bar the suit is brought under another limb of the instrument (the *guilder election*) and inasmuch as the "gold clause" is not involved at bar, neither the *Norman* nor the *Inversiones* case condemn the payment sought by Petitioner.

Furthermore, the transaction in the *Inversiones* case was purely a domestic one, the bonds were payable *only* in gold dollars in New York, there were no foreign money alternatives in the instrument, and the New York Court of Appeals

quite properly held that in a suit brought in the Courts of that State to enforce the "gold clause" provision of the bonds, lawful money only could be recovered, but not the value of the gold coin. In other words, the New York Court applied to the *Inversiones* case the rule which this Court had applied in the *Norman* case—it struck the "gold coin" term attached to the dollar amount, the remainder of the instrument remaining intact.

To conclude this point, *amicus* adopts for his own summary the following masterly statement of Professor Nussbaum (84 U. of Pa. L. R., at pp. 578-579) in respect of the inapplicability of the Joint Resolution to multiple currency clauses:

"To sum up: The multiple currency situation under both legal and legislative views is wholly different from the gold clause situation. It cannot be presumed therefore, that Congress, in impairing the gold clauses, intended to reach the multiple currency clauses. Hence, an American holder of a multiple currency bond does not evade the Joint Resolution when choosing payment in foreign currency under the terms of the bond. Even less does he directly violate the Resolution since its text is unambiguously confined to gold obligations. No true interpretation of the Joint Resolution can ever yield a different result. It has been said that the Joint Resolution is poorly drafted. However, compared with the numerous foreign statutes abrogating or encroaching upon gold clauses, the American law, which in a remarkable way utilizes foreign doctrines, is a model of carefulness. Perfect clarity is not missing with regard at least to multiple currency clauses. But still if there were an ambiguity in the text the Resolution would not be applicable to the multiple currency situation for the very material reasons expounded above."

POINT B.

Accepted Conflict of Laws doctrines are applicable in bankruptcy; the laws of Holland govern the performance of the instruments at bar; and under both American and Dutch law Petitioner's contentions as to performance are correct.

(1) The bankruptcy courts of the United States apply Conflict of Laws doctrines.

It is well established that the Federal bankruptcy courts will apply the usual Conflict of Laws doctrines in adjudicating claims and contests or in deciding any other matters arising before them which involve Conflict of Laws questions. Thus, in *In re Champion Shoe Machinery Co.*, 17 Fed. Supp. 985 (District Court, E. D. Mo.), an intervening petitioner in a reorganization under Section 77B of the Bankruptcy Act petitioned for an order directing the debtor to pay over sums collected by it as collateral on notes. The debtor's defense was that the notes in question, executed in Missouri, bore interest in excess of the statutory rate of 8%, were thus usurious and hence were discharged. However, against this contention, the court granted the order, holding as one ground for its decision that the place of performance of the contract was the State of Illinois, even though the note had been made in Missouri, and that under the Illinois law the 8% rate was not usurious. In reaching its conclusion on this phase, the court in its decision said (p. 986):

" * * * Where a contract is usurious by the law of the place where it is made, but not usurious where the obligation is to be paid, the parties will be presumed to have contracted in accordance with the law of the place of payment and the contract will be upheld. *Seeman et al. v. Philadelphia Warehouse Company*, 274 U. S. 403, 47 S. Ct. 626, 71 L. Ed. 1123; *Andrews v. Pond et al.*, 13 Pet. 65, 10 L. Ed. 61; *Long v. Long*, 141 Mo. 352, 44 S. W. 341; *Central National Bank v. Cooper*, 85 Mo. App. 383. In 66 Corpus Juris, 150, the following statement is made: 'When

a contract is usurious by the law of the place where it was made, but the rate of interest is not higher than is lawful in the place where the obligation is to be paid, the parties will be presumed to have contracted with reference to the latter place, and the contract will be upheld, provided always that there is no evidence showing bad faith or an intention to evade the usury laws of the place of contract, * * *.

"The order prayed for is granted."

Similarly in *Clark v. Huckaby*, 28 F. (2d) 154 (C. C. A. 8th), cert. den. 278 U. S. 648, the Circuit Court of Appeals for the Eighth Circuit had before it a proceeding involving the validity of the lien of a chattel mortgage. The bankruptcy referee for the Northern District of Oklahoma had sustained the chattel mortgage lien as to certain store fixtures and denied the lien as to a certain stock of merchandise. The District Court in review had upheld the lien as to both items. On appeal the court, indicating that conflict principles should be applied, reversed and remanded the case.

In many other cases, Conflict of Laws doctrines have been applied in bankruptcy as a matter of course.

See: *Irving Trust Co. v. Maryland Casualty Co. et al.*, 83 F. (2d) 168, 171-172 (C. C. A. 2nd), cert. den. 299 U. S. 571; *In re Barnett*, 12 F. (2d) 73 (C. C. A. 2nd), cert. den., sub. nom. *United Cigar Stores Co. of America v. Rayher*, 273 U. S. 699; *In re Newark Shoe Stores, Inc.*, 2 Fed. Supp. 384 (D. C. Md.); *In re Motor Products Mfg. Corp.*, 90 F. (2d) 8 (C. C. A. 9th).

(2) Applying accepted Conflict of Laws doctrines to the Petitioner's proof of claim, the law of Holland,—the place where the contracts were by their terms to be performed,—governs.

With regard to Petitioner's proof of claim (R. 2) and supplement thereto (R. 104-106), the record shows that the First Terminal Bonds and coupons therein included were duly presented for payment abroad in Amsterdam, Holland. that Petitioner demanded payment of guilders in accordance

with the tenor of the instruments, and that payment was refused (R. 159-160, 169-172).

Petitioner, by demanding payment in Holland, thus fixed that country as the place of performance (*St. Louis Southwestern case, Pan-American Securities Corp. v. Fried. Krupp, Lann v. United Steel Works Corp.*, all cited *supra*, Cf. *Seeman v. Philadelphia Warehouse Co.*, 274 U. S. 403).

Accordingly, by Petitioner's aforesaid election of the guilder alternative, the instruments as to which the election was made (see form of First Terminal Bond and coupon, *supra*, pp. 5-6) became payable in guilders as if no other alternative had ever existed, and the failure to pay the instruments in accordance with their tenor,—as that tenor was indicated by Petitioner's election,—constituted a breach as if the respective contracts had originally provided solely for the performance demanded by Petitioner in Amsterdam, Holland (*Restatement, Contracts*, Sec. 325[2]).

Succinctly, the matters connected with the performance of a contract are regulated by the law prevailing at the place of performance (*Scudder v. Union National Bank*, 91 U. S. 406 [1875]; *Union National Bank v. Chapman*, 169 N. Y. 538 [both cases involving negotiable instruments payable at a place other than the place where made]).

And:

“The law of the place of performance determines the medium of payment in which a contract to pay money is to be performed” (*Restatement, Conflict of Laws*, Sec. 364).

(3) Under both American and Dutch law, Respondents' objections to Petitioner's proof of claim, in so far as based upon the Joint Resolution, are without merit and must fall.

In the case at bar, the choice as to the place and medium of payment was conferred by the instruments themselves and was exercised in accordance therewith. This choice was left to the holders of the instruments. Having exercised their choice to take guilders in Holland, the instruments should

be construed according to the laws of Holland—and this whether or not the Joint Resolution would have applied had the choice been exercised in America. Even if otherwise applicable to the multiple currency features (which we deny—see Point A, *supra*), the Joint Resolution cannot extend to contracts to be performed and instruments payable in Holland (see *American Banana Co. v. United Fruit Co.*, 213 U. S. 347, and other cases cited on p. 17, *supra*).

There is no contention made, nor can there be, that Holland either applies the Joint Resolution or has the Dutch equivalent of a Joint Resolution. As a matter of fact, Articles 1308-1313 of the Dutch Civil Code provide that in case of alternative obligations the debtor is absolved by the delivery of one of two things contained in the obligation, and that the choice belongs to the debtor unless it has been granted to the creditor; if, where the choice has been left to the creditor, one of the two things has perished or can no longer be delivered, the creditor is entitled to the other. In the case at bar, the choice has been left to the creditor (see form of First Terminal Bond and coupon, pp. 5-6, *supra*), one of the alternatives (the "gold coin" term) can no longer be delivered, and accordingly the Petitioner as creditor is entitled to any other alternative which it elects, at bar, guilders.

An analogous situation was recently considered in England. In that case, Canada, in 1937, having abrogated gold clause obligations (and at bar we are not concerned with the "gold clause" of the instruments—only with the multiple currency feature), a foreign holder, having exercised its option to receive interest payments in London, sued in England for principal and interest measured by the gold clause of the bond which provided for payment in Canadian gold dollars in Canada or in sterling in London. The Court of Appeal held that since the contract was performable in England—the holder having elected performance in England—the English law governed and required full payment according to the gold clause (*British & French Trust Corporation, Ltd., v. New Brunswick Railway Co., Ltd.*, 54 The T. L. R.

173 (1937) [Court of Appeal] [affirmed by the House of Lords, December 13, 1938, 55 The Times L. R. ...].¹²

At bar, the payment chosen by Petitioner was lawful when the instruments were issued; it is lawful in Holland, the place of performance, to-day, when and where performance is due. It is lawful in America to-day.

As well stated by Judge Hand in his opinion (p. 12) in the *St. Louis Southwestern* case, *supra*:

" * * * by the law of most civilized countries the legality of a contract depends upon the law of the place of performance, and a contract is enforceable, if lawful by the law of the place of making when made and if the performance is lawful by the law of the place of performance when due. Certainly that is true of our own law. Restatement of Conflict of Laws, §360. If the resolution had meant to prescribe otherwise, it would in substance have been an invasion of the prerogative of other states, and would be properly resented as contrary to the implications of mutual comity; we are justified in insisting that a statute must make such an intent plain beyond any doubt."

The Joint Resolution certainly does not make any such intent "plain beyond any doubt". To the contrary, payment of foreign moneys abroad is not even mentioned therein, much less inhibited; and its clear wording excludes any assumption that such payment was intended to be interdicted thereby.

Bondholders and couponholders, choosing guilders in Holland, are entitled to recover the full value thereof, whether American or Dutch law be applied.

¹² For English decisions to the effect that the law of the place of performance will govern, see: *Adelaide Electric Supply Co., Ltd., v. Prudential Assurance Co., Ltd.*, 50 The T. L. R. 147 (1934); *Rex v. International Trustee for the Protection of Bondholders, A. G.*, 53 The T. L. R. 507 (1937). Cf. *Feist v. Societe Intercommunale Belge d'Electricite*, 50 The T. L. R. 143 (1934). Cf., also, *Case of Serbian Loans*, Perm. Court of Int. Just., Series A, No. 20 (1929); *Case of the Brazilian Loans*, *id.*, No. 21 (1929). See, also, *Dicey, Conflict of Laws* (2d Ed.), 563.

POINT C.

The functional approach to Respondents' interpretation of the Joint Resolution discloses the fallacy of any such interpretation.

Amicus of course agrees, without argument, that if a holder of a multiple currency bond presents the same in the United States and demands gold dollars, the Debtor's obligation in respect of the bond would be fully discharged by the payment of an equal number of present lawful American dollars. This would be strictly according to the tenor of the instrument itself, the demand having been made in America, the currency selected being coin or currency of the United States, and the Joint Resolution simply striking the "gold coin" term from the instrument, and permitting the payment of the same number of present lawful dollars as is exactly specified in the instrument itself (say, \$1,000 in currency of the United States in the case of a typical bond).

Let us, however, apply the pragmatic test to Respondents' interpretation of what happens or should happen upon presentation of the same bond (and coupon) in Amsterdam, Holland, and demand for the specific number of foreign monetary units expressed in the instrument (in the typical case, 2,490 guilders) :

(1) May the Debtor tender in Amsterdam, Holland, \$1,000 in currency of the United States for each bond of 2,490 guilders and thereby fully discharge its obligations on the bond?

(2) May the Debtor tender in Amsterdam, Holland, for each bond that number of guilders (less than 2,490) which \$1,000 in currency of the United States would purchase in Holland?

(3) May the Debtor refuse to make any payment at all in Holland and insist that it has the right to pay the bond at its office or agency in the United States, instead of in Holland, the place of payment selected by the holder (in whom is vested the choice of currencies and the choice of the place of payment) ?

(4) If the choice of the place of payment thus passes to the Debtor, may the Debtor pay *in the United States* \$1,000 in currency of the United States, and thereby discharge the obligation created by the demand in Holland for the payment of 2,490 guilders in Holland?

(5) If the choice of the place of payment thus passes to the Debtor, may the Debtor pay in the United States that number of Dutch guilders (less than 2,490) which \$1,000 in currency of the United States would purchase, and thus discharge the obligation to pay 2,490 guilders in Holland created by the holder's demand in Holland?

(6) If the choice of the place of payment thus passes to the Debtor, is the foreign holder, for whom the foreign places and currencies of payment were more particularly provided, forced to make presentation and demand in America?

(7) Must such last-mentioned presentation and demand be for payment in dollars?

(8) If the reasoning adopted by Respondents in respect of illegality (and the unfounded inference necessarily flowing therefrom that the instruments here sued upon are based upon an illegal consideration) is sound, is the entire bond, as well as each and every provision thereof, and the obligations contained therein, void, and, if so, is the Debtor relieved from any payment thereon whatever?

In asserting (in effect) that the Debtor is entitled to tender in the United States \$1,000 in currency of the United States for each bond of 2,490 guilders, although payment hereof was demanded in Holland in 2,490 guilders in Dutch currency, Respondents have failed to answer or consider the very material questions set forth above.

And yet if the burden of Respondents' contentions is to prevail, all the above questions must be answered in the affirmative, though confusion worse confounded would result. To state the questions and to assume the affirmative answers made necessary by Respondents' interpretation of the Joint Resolution, is to state a complete refutation to Respondents' arguments at bar, and to disclose their fallacy.

Congress could never possibly have anticipated or intended any such results. Certainly there is no word or syllable in the Joint Resolution that would lead any legislator, or any court construing the legislation, to believe that any such result was anticipated or intended. The debates in Congress contain no word or syllable that would indicate that any such result was or could have been anticipated or intended. The Joint Resolution itself expressly limits its impact to (a) gold or (b) a particular kind of coin or currency of the United States or (c) an amount in money of the United States measured thereby. It does not affect and was not intended to affect any payments of foreign monetary units, either in the United States or abroad. The only tenable and reasonable construction of the Joint Resolution is that contended for by Petitioner and *amicus*.

The functional analysis above—an analysis necessary and vital to the correct interpretation of the Joint Resolution—leads irresistibly and unmistakably to the conclusion that the Joint Resolution does not affect the multiple currency provisions of the instruments sued upon.

POINT D.

Damages should be assessed as of the date of the filing and approval of the petition for reorganization.

In respect of damages for breach of a contract to deliver foreign moneys, this Court, in *Deutsche Bank v. Humphrey*, 272 U. S. 517, 519, said as follows:

“An obligation in terms of the currency of a country takes the risk of currency fluctuations and whether creditor or debtor profits by the change the law takes no account of it. *Legal Tender Cases*, 12 Wall. 457, 548, 549.”

See, also: *Hicks v. Guinness*, 269 U. S. 71; *Zimmermann v. Sutherland*, 274 U. S. 253.

The following bankruptcy cases make it clear, we think, that December 12, 1935 (the date of the filing and approval of the petition for reorganization) is the proper date for assessing damages in a bankruptcy proceeding. *Central Trust Company v. Chicago Auditorium Association*, 240 U. S. 581, where claimant was allowed to prove for the full value of a license to carry baggage and passengers, which license was deemed to have been breached by the proceedings; *Samuels v. Drew (Claim of El Dorado Oil Works et al.)*, 292 Fed. 734 (C. C. A., 2d), where the Circuit Court of Appeals held that the appointment of receivers had created a fund for the benefit of creditors, and added at page 736:

"The participation in the fund by creditors is determined by the value of the claim at the time when the fund is created, and that is the date of the appointment of the receivers. These principles were enunciated in *Merrill v. National Bank, etc.*, 173 U. S. 131, 19 Sup. Ct. 360, 43 L. Ed. 640."

Samuels v. Drew (Claim of El Dorado Oil Works), 286 Fed. 278 (D. C., S. D. N. Y.), where the measure of damages for the anticipatory breach of an insolvent's contract to purchase cocoanut oil was fixed as the difference between the contract price and the market price on the date of the receivership; *Samuels v. Drew (Claim of Produce Brokers' Co., Limited)*, 286 Fed. 281, where it was held, in connection with sterling bills of exchange on which the insolvent was liable, that the amount of all claims against the estate is to be ascertained as of the date of the appointment of the receiver, and that sterling claims "are to be allowed in dollars at the rate of exchange prevailing on October 30, 1920" (p. 282), said date being the date of the appointment of the receivers; *Samuels v. Drew (Claim of Banco Nacional Ultramarino)*, 296 Fed. 882 (C. C. A., 2d, 1924), where it was held, on two instruments for the payment of pounds sterling, that these were executory contracts, terminated by the appointment of the receivers on October 30, 1920, and where the claim for damages for the failure to pay the sterling was computed by the Circuit Court of Appeals as of

the date of the appointment of the receivers (citing, also, *Samuel v. Drew*, C. C. A., 292 Fed. 733; *Pennsylvania Steel Co. v. New York City Railway Co.*, 198 Fed. 721).

Cf. *Rochm v. Horst*, 178 U. S. 1.

Our views in this regard are likewise supported by clause (1) of amendatory Section 77 of the Bankruptcy Act, reading as follows:

"(1) In proceedings under this section and consistent with the provisions thereof, the jurisdiction and powers of the court, the duties of the debtor and the rights and liabilities of creditors, and of all persons with respect to the debtor and its property, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the debtor's petition was filed."

See, further, Bankruptcy Act, Sec. 63(a) (U. S. C. A., Title 11, Sec. 103); *Remington on Bankruptcy*, Vol. 2, Sec. 757, and cases cited; *In re Simon*, 197 Fed. 105 (D. C. W. D. N. Y.); *Board of County Commissioners v. Hurley*, 169 Fed. 92 (C. C. A. 8th, 1909); *Maynard v. Elliott*, *supra*.

Whether, therefore, in an ordinary civil suit in the Federal Courts, the so-called "breach-day" rule be applied (as indicated in *Hicks v. Guinness*, *supra*), or the so-called "suit-day" rule (as indicated in *Deutsche Bank v. Humphrey*, *supra*),¹³ or the so-called "judgment-day" rule, it is respectfully submitted that in a bankruptcy proceeding the date of the filing and approval of the petition (at bar, December 12, 1935) is the proper date for assessing damages for failure to deliver foreign moneys abroad.

¹³ It would seem that at bar the "moment when the suit was brought" would be the date of filing the proof of claim.

IV.

Conclusions Concerning the Questions Raised by the Petitioner.

1. (a) The Joint Resolution does not deprive the bondholders and coupon holders of the right to choose foreign currencies abroad. .
 - (b) If it does so operate, it is an unconstitutional exercise of the powers of Congress.
 - (c) In any event, the First Terminal Bondholders and coupon holders would be entitled to damages for such deprivation.
2. Claims upon the First Terminal Bonds and coupons, based upon proper choice of guilders in Holland, should be allowed, and damages assessed as of the date of the filing and approval of the petition for reorganization herein, viz., December 12, 1935.

Dated, New York, January 14, 1939.

Respectfully submitted,



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APPENDIX "A."**PUBLIC RESOLUTION—No. 10—73D CONGRESS****[H. J. Res. 192]****JOINT RESOLUTION****TO ASSURE UNIFORM VALUE TO THE COINS AND CURRENCIES
OF THE UNITED STATES.**

Whereas the holding of or dealing in gold affect the public interest, and are therefore subject to proper regulation and restrictions; and

Whereas the existing emergency has disclosed that provisions of obligations which purport to give the obligee a right to require payment in gold for a particular kind of coin or currency of the United States, or in an amount in money of the United States measured thereby, obstruct the power of the Congress to regulate the value of the money of the United States, and are inconsistent with the declared policy of the Congress to maintain at all times the equal power of every dollar, coined or issued by the United States, in the markets and in the payment of debts, Now, therefore, be it

**RESOLVED BY THE SENATE AND HOUSE OF REPRESENTATIVES
OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED,**
That (a) every provision contained in or made with respect to any obligation which purports to give the obligee a right to require payment in gold or a particular kind of coin or currency, or in an amount in money of the United States measured thereby, is declared to be against public policy; and no such provision shall be contained in or made with respect to any obligation hereafter incurred. Every obligation, heretofore or hereafter incurred, whether or not any such provision is contained therein or made with respect thereto, shall be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal

tender for public and private debts. Any such provision contained in any law authorizing obligations to be issued or under authority of the United States, is hereby repealed, but the repeal of any such provision shall not invalidate any other provision or authority contained in such law.

(b) As used in this resolution, the term "obligation" means an obligation (including every obligation of and to the United States, excepting currency) payable in money of the United States; and the term "coin or currency" means coin or currency of the United States, including Federal Reserve notes and circulating notes of Federal Reserve banks and national associations.

SEC. 2. The last sentence of paragraph (1) of subsection (b) of section 43 of the Act entitled "An Act to relieve the existing national economic emergency by increasing agricultural purchasing power, to raise revenue for extraordinary expenses incurred by reason of such emergency, to provide emergency relief with respect to agricultural indebtedness, to provide for the orderly liquidation of joint-stock land banks, and for other purposes," approved May 12, 1933, is amended to read as follows:

"All coins and currencies of the United States (including Federal Reserve notes and circulating notes of Federal Reserve banks and national banking associations) heretofore or hereafter coined or issued, shall be legal tender for all debts, public and private, public charges, taxes, duties, and dues, except that gold coins, when below the standard weight and limit of tolerance provided by law for the single piece, shall be legal tender only at valuation in proportion to their actual weight."

Approved, June 5, 1933, at 4.40 p. m.



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APR 26 1939

Nos. 384, 495, 590, and 591

CHARLES ELBERT GODFREY
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1938

**GUARANTY TRUST COMPANY OF NEW YORK, AS
TRUSTEE UNDER ST. LOUIS SOUTHWESTERN RAIL-
WAY COMPANY FIRST TERMINAL AND UNIFYING
MORTGAGE, DATED JANUARY 1, 1912, PETITIONER**

v.

**BERRYMAN HENWOOD, TRUSTEE OF ST. LOUIS SOUTH-
WESTERN RAILWAY COMPANY, ET AL.**

**CHEMICAL BANK & TRUST COMPANY, AS TRUSTEE
UNDER ST. LOUIS SOUTHWESTERN RAILWAY COM-
PANY GENERAL AND REFUNDING MORTGAGE,
DATED AS OF JULY 1, 1930, PETITIONER**

v.

**BERRYMAN HENWOOD, TRUSTEE OF ST. LOUIS SOUTH-
WESTERN RAILWAY COMPANY, DEBTOR, AND ST.
LOUIS SOUTHWESTERN RAILWAY COMPANY**

BETHLEHEM STEEL COMPANY, PETITIONER

v.

**ZURICH GENERAL ACCIDENT & LIABILITY INSURANCE
COMPANY, LIMITED.**

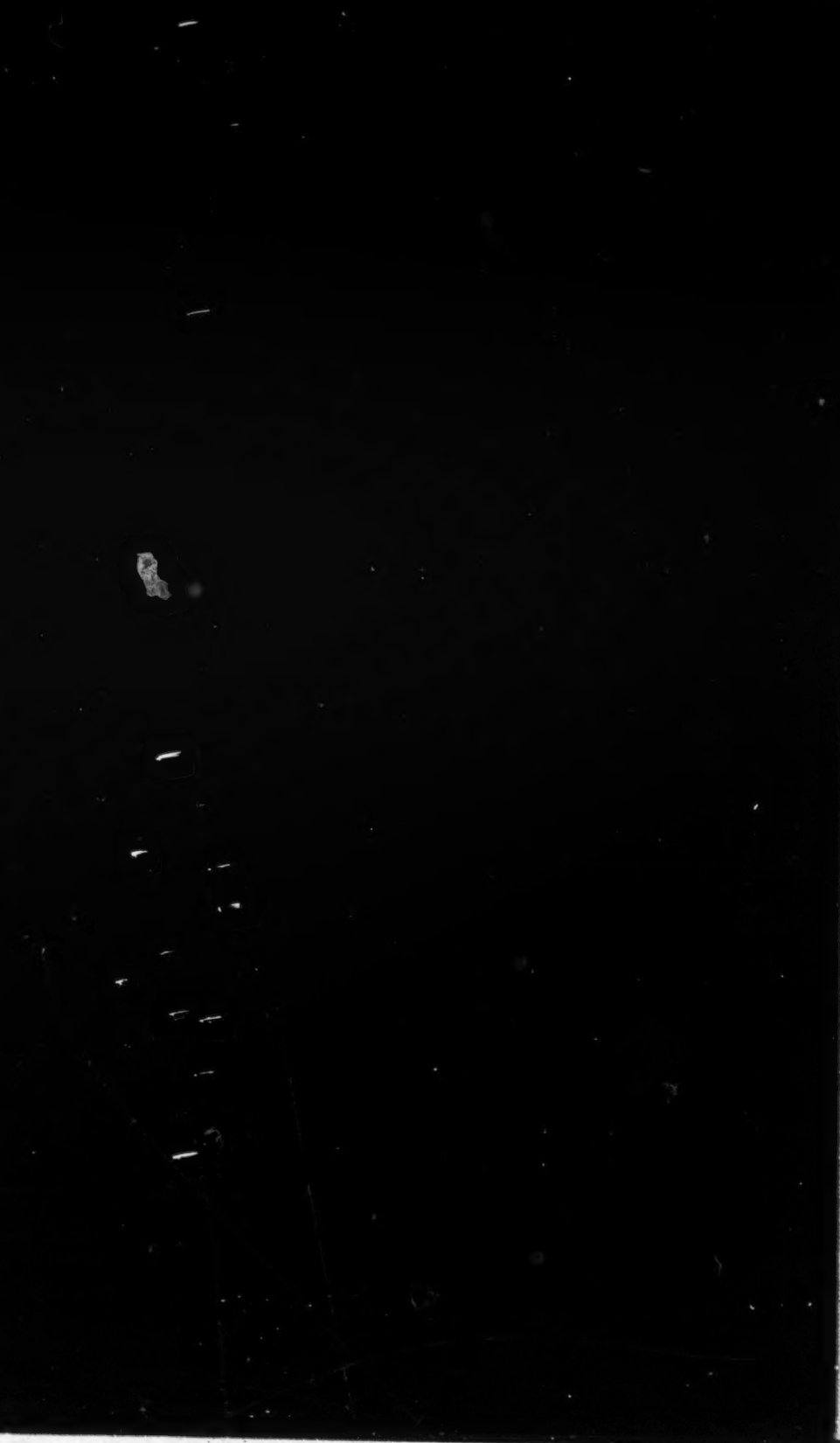
BETHLEHEM STEEL COMPANY, PETITIONER

v.

ANGLO-CONTINENTALE TREUHAND, A. G., ET AL.

**ON WRITS OF CERTIORARI TO THE UNITED STATES
CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT
AND TO THE SUPREME COURT OF THE STATE OF NEW
YORK**

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

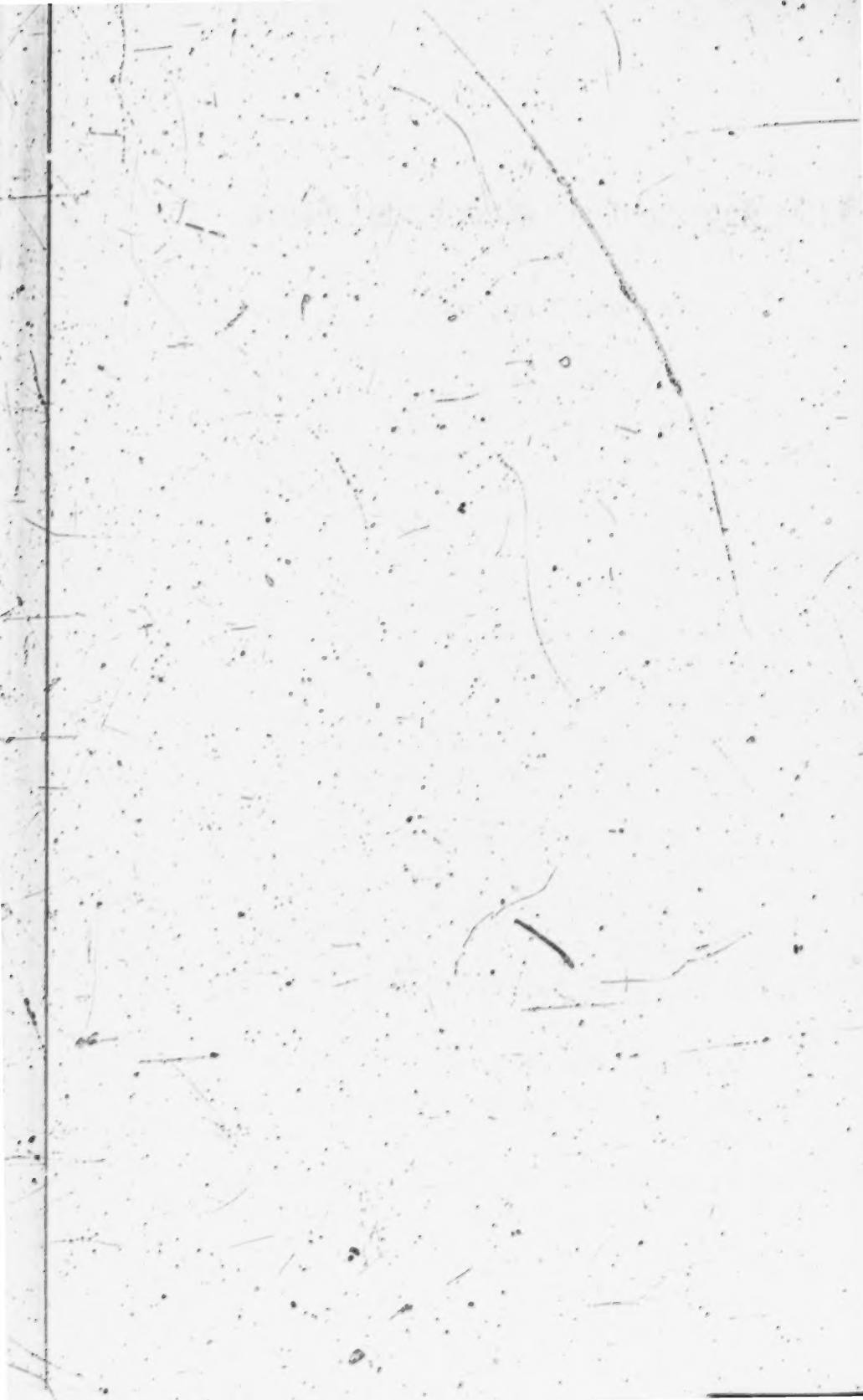


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In the Supreme Court of the United States

OCTOBER TERM, 1938

No. 384

GUARANTY TRUST COMPANY OF NEW YORK, AS
TRUSTEE UNDER ST. LOUIS SOUTHWESTERN RAIL-
WAY COMPANY FIRST TERMINAL AND UNIFYING
MORTGAGE, DATED JANUARY 1, 1912, PETITIONER

v.

BERRYMAN HENWOOD, TRUSTEE OF ST. LOUIS SOUTH-
WESTERN RAILWAY COMPANY, ET AL.

No. 495

CHEMICAL BANK & TRUST COMPANY, AS TRUSTEE
UNDER ST. LOUIS SOUTHWESTERN RAILWAY COM-
PANY GENERAL AND REFUNDING MORTGAGE,
DATED AS OF JULY 1, 1930, PETITIONER

v.

BERRYMAN HENWOOD, TRUSTEE OF ST. LOUIS SOUTH-
WESTERN RAILWAY COMPANY, DEBTOR, AND ST.
LOUIS SOUTHWESTERN RAILWAY COMPANY

No. 590

BETHLEHEM STEEL COMPANY, PETITIONER

v.

ZURICH GENERAL ACCIDENT & LIABILITY INSURANCE
COMPANY, LIMITED

(1)

No. 591

BETHLEHEM STEEL COMPANY, PETITIONER

v.

ANGLO-CONTINENTALE TREUHAND, A. G., ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES
CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT
AND TO THE SUPREME COURT OF THE STATE OF NEW
YORK

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

THE QUESTION PRESENTED

The issue¹ before the Court is whether obligations of American debtors entered into under and in contemplation of American law, which are expressed in a stated amount of dollars, and which are held by Americans or by foreigners who acquired such obligations from Americans after the passage of the Joint Resolution of June 5, 1933, 48 Stat. 112, may be discharged by the payment of such stated amount in legal tender dollars, if the obligations contain, in addition to the more usual gold dollar clauses, provisions entitling the holders thereof to payment in foreign currencies in a stated amount equivalent to the gold value of the American dollar at the time the obligations were made. The bondholders are here seeking to recover not the amount in dollars payable on the face of their obligations, but an amount in dollars measured by the exchange value of the foreign

¹ In view of this Court's recent decisions in the various gold and gold clause cases, there would appear to be no substantial question as to the constitutionality of the suggested application of the Joint Resolution.

currencies, which would give them approximately the same amount as they would be entitled to if the gold dollar clauses were enforceable as intended by the obligor and obligee.²

It is submitted that the same reasons that led the Court in *Norman v. B. & O. R. Co.*, 294 U. S. 240, to refuse to enforce the gold dollar clauses and in *Holyoke Power Company v. American Writing Paper Company*, 300 U. S. 324, to refuse to enforce the obligation to pay in legal tender dollars the value of a quantity of gold equal to that contained in a stated amount of gold dollars, require the Court to refuse to enforce the claims of the creditors now before this Court for an amount in dollars equal to the value of a stated amount of foreign currency fixed in relation to the gold value of the American dollar prior to its devaluation.

On the first argument of these cases a comparison was suggested between the obligations here involved and a straight foreign currency obligation. Clearly, the Joint Resolution was never intended to affect international obligations such as, for example, bonds issued by American debtors to foreigners calling for payment solely in a foreign currency. But the instant cases do not present the circumstances of such an international obligation. The instant cases present a situation of a domestic obligation, stipulating the United States gold dollar as the funda-

² The bondholders would not receive the full "gold value equivalent" if damages are assessed as of a date after the devaluation of the Swiss franc and the Dutch guilder. See p. 17, *infra*.

mental measure of value, where the bondholders are either Americans or are foreigners who purchased the bonds in this country after the dollar had been devalued or its devaluation had been effectively anticipated in the market price of the bonds. For the reasons hereafter detailed, it is believed that there are such clear and important distinctions between such international obligations and the situation involved in the present litigation as to have warranted the Congress in excluding the one from the scope of the Joint Resolution and at the same time including the other. It is submitted that the decision of this Court should reflect the Congressional intention to make such a distinction between international obligations and the obligations now under consideration.

**THE PURPOSE OF THE JOINT RESOLUTION IN RELATION
TO THE OBLIGATIONS HERE INVOLVED**


The broad purpose of the Resolution and the evil which it was designed to remedy are disclosed upon its face. The title of the Resolution describes it to be a "Joint Resolution To assure uniform value to the coins and currencies of the United States." This Court in *Norman v. B. & O. R. Co.*, at p. 316, recognized it to be an essential part of an undertaking by the Congress "to establish a uniform currency, and parity between kinds of currency, and to make that currency, dollar for dollar, legal tender for the payment of debts", and in *Holyoke Water Power Company v. American Writing Paper Company*, at p. 340, as a measure to assist in "the maintenance of

our monetary system." The evil to be remedied and the necessity of eradicating it are succinctly stated in the preamble of the Resolution as follows (c. 48, 48 Stat. 112):

* * * the existing emergency has disclosed that provisions of obligations which purport to give the obligee a right to require payment in gold or a particular kind of coin or currency of the United States, or in an amount in money of the United States measured thereby, obstruct the power of the Congress to regulate the value of the money of the United States, and are inconsistent with the declared policy of the Congress to maintain at all times the equal power of every dollar, coined or issued by the United States, in the markets and in the payment of debts. * * *

Recognizing and giving effect to the broad purpose of the Resolution, this Court in *Holyoke Water Power Co. v. American Writing Paper Company*, at p. 339, held the Resolution applicable to "transactions whereby gold, coined or uncoined, is to be delivered in satisfaction of a debt expressed in terms of dollars" and to "*transactions whereby a debt is to be discharged, not in bullion, but in dollars, if the number of the dollars is to be increased or diminished in proportion to the diminution or the increase of the gold basis of the currency.*" [Italics added.] Both forms of obligation were stated to be "illustrations of the very mischief that Congress sought to hit." It is submitted that a regard for "the realities of the transaction, its substance and essential purpose" (p. 335) compels the conclusion

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that the purpose and effect of the contractual provisions for payment here involved are to provide for the discharge of a dollar debt in a number of dollars to be increased or diminished in proportion to the diminution or the increase of the gold basis of the currency, and accordingly, that such obligations are within the purview of the Joint Resolution.

The primary purpose of the payment provision in the obligations here involved, as was true of the obligations involved in the *Norman* and *Holyoke* cases, was to assure the bondholder that he would receive payment in gold dollars of the standard of value in existence at the time the bonds were issued, or in an equivalent value. Perhaps in order to increase the international market for the bonds here involved, the gold dollar equivalents in foreign currencies were expressly included in the obligation as a matter of convenience to possible foreign purchasers.

But the gold dollar clause remained the fundamental and dominant measure of value. The gold dollar clause, and that alone, afforded protection against devaluation of the dollar or of the stipulated foreign currencies. The foreign currency alternatives were simply a translation of the dollar value at the then gold content of the dollar; these alternatives did not furnish independent protection to the creditor with respect to the devaluation of either American or foreign currencies. It thus appears that the spelling out of the foreign currency equivalent of the gold dollar in the multiple currency bonds simply made it easier for the foreigners to understand what they

would be getting in terms of their own currency; and the provisions for payment in their own countries enabled them to obtain their own currencies without engaging in a foreign exchange transaction.³ This conclusion is reinforced by the fact that while the great bulk of American obligations held by foreigners contained gold clauses, only a very small fraction contained multiple currency provisions;⁴ and by the fact that a large amount of multiple currency obliga-

³ There was another minor benefit accruing to the creditor by virtue of the multiple currency provision. Fluctuations in exchange rates existed in the narrow range between the gold points of the stipulated currencies, all of which were on a gold basis. The creditor was thus in a position to call for payment in that stipulated currency which at the time was selling at the highest premium within such range. It may well be that this minor advantage accruing to the creditor, plus the creditor's avoidance of the expense of the foreign exchange transaction necessary to acquire the stipulated currency desired, enabled the debtor to sell its bonds at a few points higher than if they had contained simply a gold dollar clause. However, this fact is without significance in relation to the issue in these cases.

⁴ According to Treasury estimates, approximately 90 percent of American obligations owned by foreigners contained straight gold-clause provisions, entitling the holders to gold dollars or an equivalent amount of United States currency, while approximately 10 percent of American obligations owned by foreigners contained multiple currency provisions. This indicates that foreigners had no objection to receiving American currency so long as they were entitled to receive the old gold dollar or an equivalent amount of United States currency, and that they did not purchase multiple currency obligations as a protection against the possibility of such foreign-exchange control as would prevent them from transferring their United States currency into other currencies.

tions were limited in that feature to payments of interest, as distinguished from principal.⁵

It may truthfully be said that the expectations of the creditor are disappointed and frustrated by the suggested application of the gold clause resolution. This disappointment of the creditor, however, similarly existed in the case of a straight gold dollar contract. The question at issue is not the expectation of the creditor or the intention of the debtor, but rather the intention of the Congress of the United States in adopting the Joint Resolution.

The problem facing Congress at the time it enacted the Joint Resolution may be summarized as follows:

Gold was required to be delivered to the Federal Reserve banks and none could be paid out except under special license. The President had been authorized by the Act of May 12, 1933, 48 Stat. 31, 51-53, to revalue the dollar. The "dollar had not yet been devalued. But devaluation was in prospect and a uniform currency was intended" (294 U. S. 240, 314). There were outstanding approximately \$100,000,000,000 of obligations containing some form of a gold clause. To have reduced the

⁵ According to Treasury estimates, a large portion of the multiple currency obligations issued by American debtors contained such provision with respect to payment of interest only. See, e. g., Appendix E, *infra*. If bondholders, in addition to desiring a convenient place and medium of payment, feared the exchange risk in not being able to convert dollars into the currencies of their respective countries, they would have at least insisted that the optional currency provision apply to payment of principal as well as interest.

gold content of the dollar by 40 percent while such gold clause obligations remained binding would have been impossible as a practical matter since it would have meant the increase by approximately \$70,000,000,000 of the obligations of the debtors and a consequent disruption of our economy. Accordingly, in order to revalue the dollar as desired, it became necessary to permit the discharge, dollar for dollar, of all those domestic obligations the dollar value of which would have increased automatically and proportionately with a reduction in the gold content of the dollar.

It is thus seen that contracts of the type here involved, regardless of their aggregate dollar amount, were just as truly an interference with and an obstacle to the Congressional exercise of monetary powers as were the various other types of gold clause obligations; and that uniform and equitable treatment of the whole problem required that contracts of the type here involved be dealt with in the same way as other forms of gold clause obligations. The obligations here involved are thus within the scope of the Joint Resolution viewed from the standpoint of its purpose. It is submitted that they are likewise within its language.

The language of the Resolution is comprehensive. With respect to domestic obligations having a gold clause, the purpose or effect of which is to increase the dollar value of the obligation automatically and proportionately with the reduction of the gold content of the dollar, the Resolution reveals an intention "to stop the whole business" as did the

Eighteenth Amendment with respect to the traffic in liquor. Cf. *Grogan v. Walker & Sons*, 259 U. S. 80, 89; *Danovitz v. United States*, 281 U. S. 389 '97. In view of the extensive discussion of the language of the Resolution in the briefs and oral argument of the parties, it is unnecessary to do more than to indicate that the Resolution is plainly susceptible of the construction for which we contend. The provision in the bonds and coupons for the payment in United States gold coin is clearly a "provision contained in" an "obligation", and a provision which purports "to give the obligee a right to require payment in gold or a particular kind of coin or currency" of the United States. The obligation in which such provision is contained is an obligation, as that term is defined in the Resolution, "payable in money of the United States", since the obligation is capable of being paid in dollars. In view of the fact that in the *Holyoke* case payment could be made in gold bullion as well as in currency of the United States, and that payment of either would discharge the obligation, our suggested interpretation of the words "obligation" and "payable" is implicit in this Court's holding in that case.

If the Joint Resolution had not embraced domestic obligations of the kind here under consideration, such obligations would have produced the "disparity of conditions" described by this Court in the *Norman* case, in considering the "dislocation of the domestic economy" which would result if "debtors under gold clauses should be required to pay one dollar and sixty-

nine cents in currency while respectively receiving their taxes, rates, charges and prices on the basis of one dollar of that currency." (294 U. S. 240, 315, 316.) Here, just as in the *Norman* case, the intention of Congress to establish a uniform monetary system with parity between different kinds of currency would be frustrated were the Joint Resolution held to be inapplicable. Not only would American debtors be required to make payments on one basis while receiving income determined on another basis, but on the other hand American creditors, and foreign creditors who have voluntarily entered the American economy and acquired these obligations after June 5, 1933, would receive a windfall such as was denied to the plaintiffs in the *Norman* and *Holyoke* cases and also in *Perry v. United States*, 294 U. S. 330, and which in the latter case was characterized by this Court as an "unjustified enrichment" (p. 358).

No sound reason appears why foreigners who are in the position of those involved in these cases and who hold obligations of the character involved in these cases should be regarded as being in a different position from Americans or foreigners holding domestic obligations payable solely in United States gold coin. It is clear that Americans holding such gold coin obligations are only entitled to receive payment of such obligations dollar for dollar in legal-tender currency. *Norman v. B. & O. R. Co.*, *supra*; *Holyoke Water Power Company v. American Writing Paper*

*Company, supra.*⁶ It is equally clear that foreigners holding such obligations containing a straight gold coin clause are also required to accept payment in this country dollar for dollar in legal-tender currency. *Compania de Inversiones Internacionales v. Industrial Mortgage Bank of Finland*, 269 N. Y. 22, 198 N. E. 617; certiorari denied, 297 U. S. 705.⁷

As previously indicated, it is believed the Joint Resolution is inapplicable to international obligations such as those involved in a sale of bonds to foreigners by an American debtor stipulating for payment exclusively in the currency of the country of which the foreigners are nationals. In the first

⁶ It may also be of interest to note that, so far as we have been able to ascertain, nearly every foreign court that has had occasion to pass upon the question has applied the Joint Resolution to gold dollar obligations issued by foreign governments and nationals thereof whether owned by Americans or others. *Rea v. International Trustee for the Protection of Bondholders A. G.* [1937] A. C. 500 (H. of L.); Judgment of the Swedish Supreme Court of January 30, 1937 (Swedish Government gold dollar loan), 36 Bull. I. J. I. 327, translated into English in 3 Guld Klausulmalet (Stockholm, 1937) 130 at 147; Judgment of the Swedish Supreme Court of January 30, 1937 (Kreuger and Toll secured debentures payable in United States gold coin and containing provisions for payment in pounds sterling, Swedish crowns, Dutch guilders and Swiss francs), Nytt Juridiskt Arkiv (1937) pp. 17-36; Judgment of the Norwegian Supreme Court of December 8, 1937, 38 Bull. I. J. I. 71; Judgment of City Court of Helsingfors of Dec. 23, 1937, 38 Bull. I. J. I. 280; Opinion of the Supreme Court of Austria of Nov. 26, 1935, J. D. Int. 1936, pp. 442 and 717. (Nussbaum, Money In The Law (1939) pp. 387 et seq.).

⁷ See footnote 4, *supra*.

place, such an obligation is clearly not within the language of the Joint Resolution, which defines the term "obligation" as "an obligation payable in money of the United States." Secondly, obligations payable solely in a foreign currency do not disclose an intention to make the United States gold dollar the measure of value of the obligation. Thirdly, even though revaluation of the dollar may have the effect of increasing to an American debtor the cost of discharging international obligations payable in a foreign currency, there are equities so strongly in favor of the creditor in such a situation as to have entirely warranted Congress in deciding that the debtor rather than the creditor should bear the consequences of the revaluation of the dollar. Ordinarily, the fundamental purpose of international obligations of this character is to meet the desire on the part of the foreigner to receive payment in the currency of his own country where he lives and transacts business and in which currency his debts are payable. Unless the foreigner can feel confident that he will be repaid in his own currency a serious obstacle to the making of international loans is created. Similarly, a serious obstacle to international trade would result if a foreigner selling his merchandise to an American were to be uncertain as to his right to require payment in his own currency. Congress recognizing the merit of the position of a creditor in these and comparable situations very properly left the consequences of the revaluation of the dollar to be borne in such

instances by the debtor. However, there being no such need or justification for protecting the expectation of creditors in a situation such as that involved in the present cases, Congress appropriately included these obligations within the scope of the Joint Resolution.

It is important also to observe that the Court is not called upon in the present litigation to decide the applicability of the Joint Resolution to a bond containing a gold dollar clause as well as foreign currency clauses where there is evidence to justify the application of the law of a foreign country rather than the law of this country as the proper law to govern the contract,⁸ as in the case of a bond sold in

⁸ It is true that in the case of the Bethlehem bonds some were sold in England and Holland, and were presumably paid for in sterling and guilders, and acquired by the residents of such countries, respectively. It is to be noted, however, that the sole consideration received by the debtor for all of the bonds was paid in United States dollars (R. 591, 70). Moreover, there has been no showing in the instant cases that the bonds sued on were those originally sold abroad or had been owned by residents of a foreign country since at least prior to the passage of the Joint Resolution. It is only fair to point out that it appears from the records of the cases before the Court (R. No. 590, 25-29; R. No. 591, 57-60) that the Bethlehem Steel Company, with respect to both the Bethlehem and the Lackawanna bonds, has been paying the stipulated foreign currency to holders of such obligations who submit evidence that they are bona fide residents of foreign countries and that such obligations have been owned by a bona fide resident of a foreign country since prior to June 5, 1933. There is reason to believe that other debtors of such multiple currency obligations have been following a similar practice.

a foreign country to a citizen of that foreign country and paid for in the currency of that country. Compare *Rex v. International Trustee for the Protection of Bondholders A. G.* [1937] A. G. 500 (H. of L.).

**THE FAIRNESS OF THE SUGGESTED APPLICATION OF THE
JOINT RESOLUTION**

The facts in the present cases not only illustrate the appropriateness of applying the Resolution to the obligations here involved but leave no doubt of the fairness of such application. All of the obligors in the contracts involved in these cases are American corporations (R. No. 384, 128, 158; No. 495, 254; No. 590, 7; No. 591, 7). The obligations involved in No. 384 were issued in this country to an original group of American purchasers, payment for such obligations being made in United States money (R. No. 384, 132, 133, 160). The obligations involved in No. 591 were sold by the issuing corporation to a group of American bankers, and the sole consideration received by the issuing corporation therefor was United States dollars (R. No. 591, 70). The obligations involved in No. 590 were sold partly to stockholders and partly to New York bankers, and it does not appear from the record that the issuing corporation received payment therefor in any foreign currency (R. No. 590, 50, 51). In all three cases the business of the issuing corporations was almost entirely transacted in the United States, their property was located in the United States, and the obligations were secured by mortgages on prop-

erty situated in the United States (R. No. 384, 17, 128, 129, 157, 158; No. 590, 7, 8, 13, 14, 50-53; No. 591, 70-83). The amount of foreign currency which might be elected by the obligees in all three cases was determined by the value of the United States gold dollar as of the date on which such obligations were issued⁹ (R. No. 384, 129-131, 134; No. 590, 12, 13; No. 591, 27-30). The great bulk of outstanding obligations of the character involved in No. 384 is held by American citizens and there is nothing in the records to indicate that a different situation exists in respect of the obligations involved in Nos. 590 and 591 (R. No. 384, 135). So far as appears from the records in all three cases no demand for payment in foreign currency was made prior to June 5, 1933 (R. No. 384, 134). It does not appear that any of the bondholders represented by the petitioner in No. 384 are foreigners (R. No. 384, 135). The bondholders in Nos. 590 and 591 are foreign corporations which, it appears from the records, acquired the bonds and coupons involved in suit from residents of the United States subsequent to June 5, 1933, and, as alleged by the debtors, with full notice and knowledge of the Joint Resolution of June 5, 1933, and with intent to evade the application thereof (R. No. 590, 17, 29, 42, 52-55; No. 591, 37, 38, 41, 54, 63-66). There is reason to believe that at least

⁹ The bonds involved in No. 495, which are now held by an American corporation as trustee, do not actually contain any foreign currency provision. The petitioner in that case, however, apparently contends that it occupies substantially the same position as regards payment as does the petitioner in No. 384 (R. No. 495, 22-24, 129, 204-252, 256, 260; Petitioners Brief, pp. 2-8).

one of the foreign corporations here involved is, and for many years has been, doing business on a large scale in this country.¹⁰ Under such circumstances it would seem entirely just to treat the bondholders exactly the same as the holders of straight gold-clause obligations.

If, as indicated in the tables prepared by the Treasury Department and appearing in Appendices B and C, *infra*, the dollar prices paid by the various creditors involved in these actions were approximately the par dollar amount of the bonds, and if the Joint Resolution were to be held inapplicable to such obligations, the windfall in dollars to such creditors would be approximately 69 percent if the measure of damages were determined as of a date prior to September 27, 1936, when the Dutch guilder and the Swiss franc were revalued; and if the measure of damages were determined as of some date thereafter the windfall would be approximately 32 percent where demand was made for payment in Dutch guilders, and 16 percent where demand was made for payment in Swiss francs. In this connection it is also of interest to note that if the Joint Resolution is held applicable to such obligations, the bondholders in Nos. 590 and 591 will, as indicated in the tables in Appendices B and C, nevertheless receive a substantially larger amount in terms of guilders and Swiss francs than that represented by the purchase price of such obligations.

¹⁰ See Best's Insurance Reports, Casualty, Surety and Miscellaneous (1938), pp. 494-6.

Further confirmation of the fairness of the result herein suggested is to be found in the practically universal reduction in the gold values of currencies. The chart printed in Appendix A, indicating the extent to which currencies of leading countries have depreciated from their pre-war gold parity, reveals the fact that practically all currencies have been depreciated as much or more than the dollar except the Swiss franc and Dutch guilder. The Swiss franc has been depreciated approximately 31 percent. The Dutch guilder has been depreciated approximately 22 percent. The dollar has been depreciated approximately 41 percent. Such worldwide depreciation emphasizes the windfall aspect of allowing bondholders in the situation now before the Court to recover an amount of dollars in excess of the dollar face amount of the bonds and coupons.

CONCLUSION

For the foregoing reasons it is submitted that the Joint Resolution is applicable to the obligations here involved.

Respectfully submitted.

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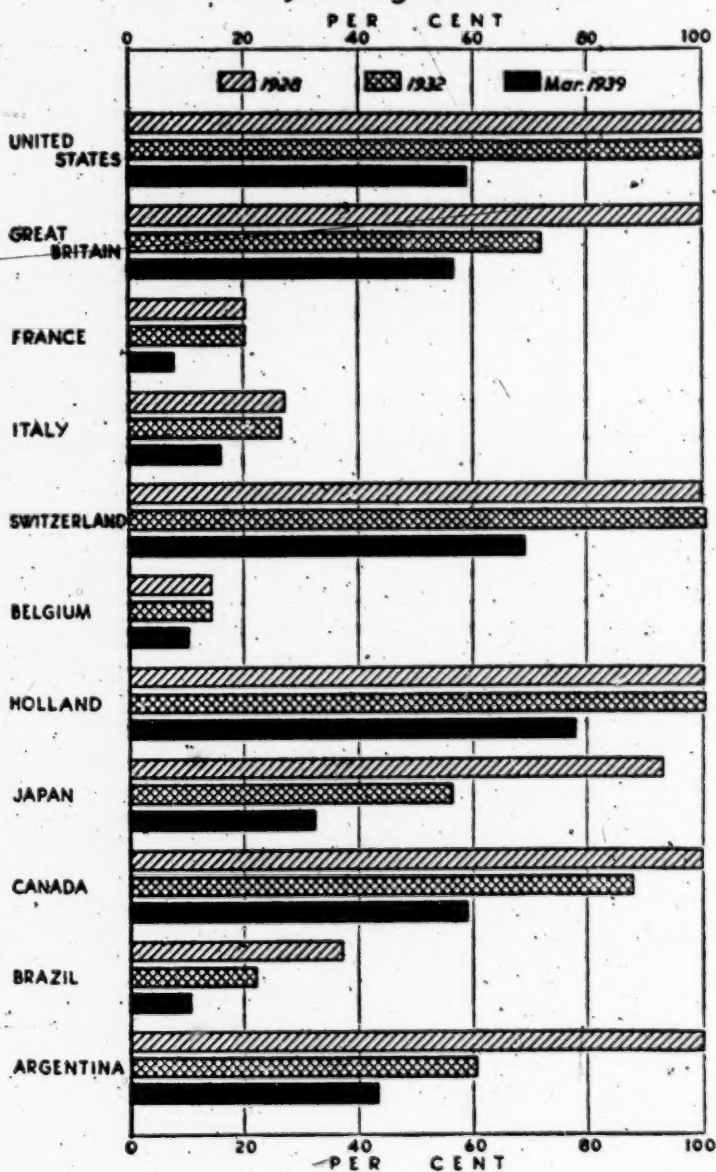
JOSEPH B. FRIEDMAN,
Attorneys, Treasury Department.

APRIL 1939.

APPENDIX A

LEADING CURRENCIES EXPRESSED AS PERCENTAGE OF PRE-WAR GOLD PARITY

Annual Averages 1928 and 1932,
and Monthly average March 1939



APPENDIX B

Prices estimated to have been paid by Zurich General Accident and Liability Insurance Company, Ltd., for certain Lackawanna Steel Company first consolidated mortgage bonds, 5's of 1950

Dates of purchases ¹	Par value	Average price quotations in dollars per \$100 bond	Estimated total amount paid in dollars	Average rate of exchange in Swiss francs at time bonds were purchased	Swiss franc equivalent of estimated dollar price paid for the bonds at time of purchase	Amount bondholders can obtain in Swiss francs at current rate of exchange ² if redemption price of 105 is paid in current dollars
Nov. 9, 1933-Dec. 13, 1933.....	\$100,000	\$98.75	\$98,750	\$0.300288	Swiss franc 319,282	Swiss franc 468,311
Jan. 11, 1934-Aug. 22, 1934.....	198,000	104.40	206,712	.322615	640,739	927,236
Aug. 9, 1934.....	25,000	104.00	26,000	.327475	79,395	117,078
Total.....	323,000	102.62	331,462	.318693	1,039,416	1,512,645

¹ In June 1937 these bonds were called for payment on Sept. 1, 1937, at 105 (Moody's "Industrials," 1938, p. 2938).

² See R. No. 890, 42.

³ On April 22, 1939, \$0.22421 per Swiss franc.

Treasury Department, Division of Research and Statistics. April 24, 1939.

APPENDIX C

*Prices estimated to have been paid for certain Bethlehem Steel Corporation,
first lien and refunding mortgage, Series A, 5 percent bonds, due May
1, 1942*

BONDS PURCHASED BY THE ANGLO-CONTINENTALE TREUHAND A. G.

Dates of purchase ¹	Par value	Average price quotations in dollars of purchases on dates specified ²	Estimated total amount paid in dollars	Average rate of exchange in Guilders on dates specified ³	Guilder equivalent of estimated dollar price paid for the bonds on dates specified ³	Amount bond-holders can obtain in Guilders at current rate of exchange ⁴ if redemption price of 105 is paid in current dollars
Specified dates between Sept. 12, 1933 and Aug. 7, 1934.....	\$350,000	\$105.15	\$368,012	\$0.648260	<i>Guilders</i> 567,692	<i>Guilders</i> 602,345

BONDS PURCHASED BY THE MONDIALE HANDELS-UND VERWALTUNGS A. G.

Specified dates between Sept. 18, 1933 and Aug. 1, 1934.....					<i>Guilders</i>	<i>Guilders</i>
	\$27,000	\$107.11	\$28,920	\$0.655087	44,147	53,409

¹ In August 1937, these bonds were called for payment on November 1, 1937, at 105 (Moody "Industrials," 1938, p. 2938).

² See R. No. 591, 63-66.

³ Weighted by the par value of bonds purchased on dates specified.

⁴ On April 22, 1939, \$0.530605 per guilder.

Treasury Department, Division of Research and Statistics. April 24, 1939.

APPENDIX D

Bonds of American corporations, interest on which is payable at the option of the holder either in American dollars or in one or more foreign currencies at a fixed rate of exchange¹—by type of currency option

[Amounts in millions of dollars and as of December 31, 1933]

TOTAL

	Total out- standing	Foreign holdings
Payable in American and Canadian dollars.....	2	.....
Payable in American dollars, Canadian dollars, and Sterling.....	11	.....
Payable in American dollars and Sterling.....	214	15
All other options.....	307	22
Total.....	534	37

NOW : OUTSTANDING AND NOT IN DEFAULT

Payable in American and Canadian dollars.....	.....	.....
Payable in American dollars, Canadian dollars, and Sterling.....	11	.....
Payable in American dollars and Sterling.....	102	9
All other options.....	102	13
Total.....	215	22

NOW : IN DEFAULT

Payable in American and Canadian dollars.....	.....	.....
Payable in American dollars, Canadian dollars, and Sterling.....	.....	.....
Payable in American dollars and Sterling.....	112	6
All other options.....	150	6
Total.....	262	12

NOW : CALLED

Payable in American and Canadian dollars.....	2	.....
Payable in American dollars, Canadian dollars, and Sterling.....	.....	.....
Payable in American dollars and Sterling.....	.....	.....
All other options.....	55	3
Total.....	57	3

¹ Bonds selected and data on outstanding amounts and foreign holdings supplied by the Bureau of Foreign and Domestic Commerce. Excludes issues in default on December 31, 1933.

² April 1939.

APPENDIX E

New York City bonds containing a provision for the payment of interest in dollars or sterling at the option of the holder,¹ classified by years of issuance and of maturity

Year of issuance	Amount	Year of maturity	Amount
1906.....	\$12,000,000	1958	\$22,000,000
1909.....	80,800,000	1959	80,800,000
1911.....	80,000,000	1960	60,000,000
1912.....	35,000,000	1962	65,000,000
1913.....	45,000,000	1963	45,000,000
1914.....	65,000,000	1964	65,000,000
	307,500,000		307,800,000

¹ Tabulated from Moody's "Governments" for 1939. The principal of all the bonds is payable only in United States dollars. The dollar-pound rate of exchange on April 19, 1939, was \$4.87. So long as the pound is less than the rate of approximately \$4.87 specified in the bonds, it is to the advantage of the bondholders to demand payment of interest in dollars rather than sterling. The Treasury Department has learned that since the summer of 1935 payments of interest in sterling have been restricted to British nationals with British residence, and that New York City made payments of interest in sterling, as follows:

1935.....	£34,537
1936.....	£19,011
1937.....	£8,007
1938.....	£4,640
1939 (to April).....	None

The Treasury Department does not know of any outstanding multiple currency bonds of states, municipalities, etc., of this country other than those issued by New York City.

APPENDIX F

Bonds interest on which is payable in dollars and also at a fixed rate of exchange in one or more foreign currencies ¹

(Millions of dollars)

Debtor	Currencies in which payable (See Legend)				Total
	1-2	1-2-3	1-3	Other	
New York City.....			320	32	352
United States corporations.....	3	54	306	113	476
Other corporations.....	445	502	150	43	1,140
Dominion of Canada ²	225	374			600
Canadian provinces and municipalities.....	578	364	11		953
Governments other than United States and Canada.....	6	10	216	149	381
Total.....	1,257	1,304	1,003	337	3,901

Legend:

1-2—American and Canadian dollars.

1-2-3—American dollars, Canadian dollars and Sterling.

1-3—American dollars and Sterling.

Other—All other options.

¹ Tabulation based on pamphlet of A. Iselin and Company. Issues under \$1 million and issues in default not included in source. Probably incomplete. Exact date unknown but probably late 1933 or 1934.

² Since 1933 New York City has retired the \$32,000,000 of its obligations which contained a provision for the payment of interest in French francs as well as in dollars.

³ Including guaranteed obligations.

Treasury Department, Division of Research and Statistics. April 21, 1939.

P. 4 dissent

SUPREME COURT OF THE UNITED STATES.

Nos. 384 and 495.—OCTOBER TERM, 1938

Guaranty Trust Company of New York,
as Trustee Under St. Louis South-
western Railway Company First Ter-
minal and Unifying Mortgage, Dated
January 1, 1912, Petitioner,

384 vs.
Berryman Henwood, Trustee of St. Louis
Southwestern Railway Company, et al.

Chemical Bank & Trust Company, as
Trustee Under St. Louis Southwestern
Railway Company General and Re-
funding Mortgage, Dated as of July 1,
1930, Petitioner,

495 vs.
Berryman Henwood, Trustee of St. Louis
Southwestern Railway Company, Debt-
or, and St. Louis Southwestern Rail-
way Company.

On Writs of Certiorari
to the United States
Circuit Court of Ap-
peals for the Eighth
Circuit.

[May 22, 1939.]

Mr. Justice BLACK delivered the opinion of the Court.

In the bankruptcy reorganization of the St. Louis Southwestern Railway Company, a Missouri Corporation, petitioners filed claims for bondholders. They asserted a right under the bonds to be paid in Dutch guilders, and asked that their claims—based upon guilder value—be allowed for \$37,335,525.12. The trustee in bankruptcy contended, and the courts below held that the Joint Resolution of June 5, 1933,¹ made the bonds dischargeable by payment of current legal tender United States money,² and petitioners'

¹ 48 Stat. 112, 31 U. S. C. 463.

² 298 F. (2d) 160, 179. The Court of Appeals for the Second Circuit previously held to the contrary, *Anglo-Continentale, etc. v. St. L. Southwestern Ry.* Co., 81 F. (2d) 11, cert. den. 298 U. S. 655, and the Court of Appeals of New

claims were accordingly allowed for \$21,638,000.00, the face amount of their bonds in dollars.

These bonds, secured by a trust mortgage, were issued and sold in the United States in 1912. Purchasers paid and the railroad received United States dollars, and until 1936 interest was regularly paid in dollars.

The asserted right to guilder payment rests upon a provision of the bonds concededly granting holders an option to elect payment in dollars, guilders, pounds, marks, or francs. This multiple currency provision was authorized by the following terms of the mortgage securing the bonds:

"... the . . . Bonds may be payable, at the option of the holder, both as to principal and interest, at some one or more of the following places in addition to the City of New York, and in the moneys current at such respective places of payment, at the following rates of exchange or equivalents of \$1,000, viz.: In London, England, £205.15.2 Sterling, or in Amsterdam, Holland, 2490 guilders, or in Berlin, Germany, 4200 marks, D. R. W., or in Paris, France, 5180 francs; . . ."

The bonds themselves provide:

"St. Louis Southwestern Railway Company, . . . for value received, hereby promises to pay to the bearer, or, if registered, to the registered holder, of this bond, on the first day of January, 1952, at its office or agency in the Borough of Manhattan, City and State of New York, One Thousand Dollars in gold coin of the United States of America, of or equal to the standard of weight and fineness as it existed January 1, 1912, or in London, England, £205 15s 2d, or in Amsterdam, Holland, 2490 guilders, or in Berlin, Germany, marks 4200, D. R. W., or in Paris, France, 5180 francs, and to pay interest thereon, at the rate of five per cent. per annum, from the first day of January, 1912, in said respective currencies, semi-annually . . ."

Since the parties agree that the terms of the bonds granted holders an option to elect payment in guilders, we must determine whether, despite this option, the Joint Resolution operated to make the bonds dischargeable in current United States legal tender—a dollar of legal tender to be repaid for every dollar borrowed. *

York did likewise in *Zurich, etc. Co. v. Bethlehem Steel Co.* and *Anglo-Continental, etc. v. Bethlehem Steel Co.*, 279 N. Y. 495, 790, Nos. 590 and 591, this day decided. Because of the divergence of views on this important question, we granted certiorari, — U. S. —

Analysis of the terms of the Resolution³ discloses, first, that Congress declared certain types of contractual provisions against public policy in terms so broad as to include then existing contracts, as well as those thereafter to be made. In addition, future use of such proscribed provisions was expressly prohibited, whether actually contained in an obligation payable in money of the United States or separately "made with respect thereto." This

JOINT RESOLUTION

To assure uniform value to the coins and currencies of the United States.

Whereas the holding of or dealing in gold affect the public interest, and are therefore subject to proper regulation and restriction; and

Whereas the existing emergency has disclosed that provisions of obligations which purport to give the obligee a right to require payment in gold or a particular kind of coin or currency of the United States, or in an amount in money of the United States measured thereby, obstruct the power of the Congress to regulate the value of the money of the United States, and are inconsistent with the declared policy of the Congress to maintain at all times the equal power of every dollar, coined or issued by the United States, in the markets and in the payment of debts. Now, therefore, be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) every provision contained in or made with respect to any obligation which purports to give the obligee a right to require payment in gold or a particular kind of coin or currency, or in an amount in money of the United States measured thereby, is declared to be against public policy; and no such provision shall be contained in or made with respect to any obligation hereafter incurred. Every obligation, heretofore or hereafter incurred, whether or not any such provision is contained therein or made with respect thereto, shall be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts. Any such provision contained in any law authorizing obligations to be issued by or under authority of the United States, is hereby repealed, but the repeal of any such provision shall not invalidate any other provision or authority contained in such law.

(b) As used in this resolution, the term "obligation" means an obligation (including every obligation of and to the United States, excepting currency) payable in money of the United States; and the term "coin or currency" means coin or currency of the United States, including Federal Reserve notes and circulating notes of Federal Reserve banks and national banking associations.

Sec. 2. The last sentence of paragraph (1) of subsection (b) of section 43 of the Act entitled "An Act to relieve the existing national economic emergency by increasing agricultural purchasing power, to raise revenue for extraordinary expenses incurred by reason of such emergency, to provide emergency relief with respect to agricultural indebtedness, to provide for the orderly liquidation of joint-stock land banks, and for other purposes", approved May 12, 1933, is amended to read as follows:

"All coins and currencies of the United States (including Federal Reserve notes and circulating notes of Federal Reserve banks and national banking associations) heretofore or hereafter coined or issued, shall be legal tender for all debts, public and private, public charges, taxes, duties, and dues, except that gold coins, when below the standard weight and limit of tolerance provided by law for the single piece, shall be legal tender only at valuation in proportion to their actual weight."

Approved, June 5, 1933, 4.46 p. m.

proscription embraced "every provision" purporting to give an obligee a right to require payment in (1) gold; (2) a particular kind of coin or currency of the United States; or (3) in an amount of United States money measured by gold or a particular kind of United States coin or currency.

Having thus unmistakably stamped illegality upon both outstanding and future contractual provisions designed to require payment by debtors in a frozen money value rather than in a dollar of legal tender current at date of payment, Congress—apparently to obviate any possible misunderstanding as to the breadth of its objective—added, with studied precision, a catchall second sentence sweeping in "every obligation", existing or future, "payable in money of the United States", irrespective of "whether or not any such provision is contained therein or made with respect thereto." The obligations hit at by Congress were those "payable in money of the United States." All such obligations were declared dischargeable "upon payment, dollar for dollar, in any coin or currency [of the United States] which at the time of payment is legal tender for public and private debts." It results that the petitioners' claims rest upon "obligation[s] . . . payable in money of the United States", by the terms of the Resolution they shall be discharged upon payment of current legal tender dollars equal to the number of dollars promised in gold or a particular kind of money. Decision must therefore turn upon the nature of the "obligation[s] . . . incurred" by the railroad in its bond contracts of 1912.

These bonds provide that, "For a description of the property and franchises mortgaged, the nature and extent of the security, the rights of the holders of said bonds under the same and the terms and conditions upon which such bonds are issued and secured, reference is made to the . . . Mortgage." In determining the nature of the railroad's obligation, we, accordingly, look both to the mortgage and the bonds.

It appears that—

The railroad executed the mortgage in 1912 to the Guaranty Trust Company of New York as trustee, to secure forty year mortgage bonds "limited to an aggregate principal amount of One Hundred Million Dollars (\$100,000,000.00) at any one time outstanding . . . to be payable on the first day of

January, 1952, with interest at the rate of five per cent per annum payable semi-annually"; the bonds are payable optionally in foreign currencies as indicated above; registration in New York is required of bonds subjected to registration; to be valid all bonds must be authenticated by the Guaranty Trust Company in New York; non-coupon bonds and coupon bonds are interchangeable upon request, but non-coupon bonds contain no option for payment in foreign currencies; the New York trustee is granted broad supervisory powers (for the benefit of the bondholders) over finances and operations of the railroad; the railroad is required to keep an office in New York where bonds and coupons can be presented for payment, but is not required to keep any foreign offices; in the event of default in payment of bonds or coupons, the New York trustee is authorized, through its agents or attorneys, to take charge of the mortgaged property, to sell under foreclosure proceedings in the United States, and to protect bondholders' interests by employment of attorneys and institution of judicial proceedings either in law or equity, "for the equal benefit of all holders of . . . outstanding bonds and coupons"; should the Guaranty Trust Company resign as Trustee, the bondholders may designate another which, however, "must always be a trust company having an office in the Borough of Manhattan, in the City of New York, N. Y."

The mortgaged property is located in the United States; the trustee was required to be a New York trust company; enforcement of the trust security, collection of bonds and interest, employment of attorneys, institution of legal proceedings and distribution of assembled assets, were all responsibilities placed upon the trustee located in New York, and obviously contemplated that any necessary judicial proceedings would be had in this country under the governing law of the United States. Both the mortgage and bonds are domestic obligations, and the law of this country must determine their interpretation, their nature, and the obligations enforceable under them⁴. The Joint Resolution thus must govern if the

⁴ *Liverpool Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 453, 459; *United States v. North Car.*, 136 U. S. 211, 222; *R. v. International Trustee*, [1937] 2 All E. R. 164; *Mount Albert Borough Council v. Australasian, etc., Assurance Soc., Ltd.*, [1938] A. C. 224; *Judgment of the Supreme Court of Sweden*, (Jan. 29, 1937), reported in *Bulletin de L'Institut Juridique International*, April, 1937, pp. 327, 334.

bonds are, within its terms, "obligation[s] . . . payable in money of the United States."

In their construction of the bonds, petitioners urge that each of the alternative promises to pay in a foreign currency is a separate and independent "obligation" to pay. From this, they argue that the only "obligation" for which enforcement is here sought is one "payable" in guilders which must be treated as though it were an entirely separate and independent promise of the railroad. But the railroad undertook only a single obligation to repay the money it borrowed. Repayment of that money might be called for in any one, but only one, of the five different types of money. This, however, did not divide the railroad's undertaking to repay into five separate and independent obligations to repay the same loan. Payment under the contract in any one of the currencies selected by the bondholder would discharge the entire single obligation of the debtor. Payment in guilders, after payment in guilders was elected, would nonetheless discharge an obligation which prior to such election and payment was an obligation also payable in United States dollars. The language of the Joint Resolution was intended to refer to a monetary obligation in its entirety. That which the Joint Resolution made dischargeable was the debt—the monetary obligation to pay. This debtor's obligation was a monetary obligation. The foreign currencies promised were not bartered for as commodities, but their function was that of money to be paid in countries in which they were legal tender and upon them interest was to be paid.⁵ Interest is not paid on commodities but on monetary obligations. And these promises in alternative currencies were not separate and independent contracts or obligations, but were parts of one and the same monetary obligation of the debtor.

The point is made, however, that this obligation of the railroad was never payable in United States money because the option to receive payment in dollars has never been exercised. Conceding that one meaning of "payable" is "capable of being paid", petitioners nevertheless urge that the use of this meaning should not be attributed to Congress, but that instead we must narrow and restrict "payable" to mean an absolute and unconditional obligation. But the railroad, since the day its bonds were issued, was under obligation to hold

⁵ *Holyoke Power Co. v. Paper Co.*, 300 U. S. 324, 335-336; *Norman v. B. & O. R. Co.*, 294 U. S. 240, 302

itself prepared to pay United States money—or any one of the optional currencies. And, on the date the Resolution went into effect, no election had been made so that the railroad was, at that time, still under obligation to pay dollars. If prior to election by the holders the railroad was under no obligation to pay United States money, it was likewise under no obligation to pay any money, United States or otherwise, although it then had outstanding a \$100,000,000.00 mortgage on all of its properties. Neither in logic nor law can it be said that the railroad's promise, secured by a \$100,000,000.00 mortgage, to pay in any one of five currencies was not an obligation payable in any currency until express election of payment in a particular currency was made. Legal rights and obligations came into existence when the contracts for purchase of the bonds were completed. Since the words "obligation[s] . . . payable in money of the United States" are clearly broad enough to require inclusion of these multiple currency obligations, there is no justification here for restricting the meaning of these words of the Resolution. Consideration of the evils aimed at leaves no doubt but that such restriction would do violence to the intention of the Congress.

The report of the Senate Committee on the Resolution opens with words revealing its purpose. It is there stated that "Certain questions of interpretation have arisen with respect to the legislation empowering the President to prevent the withdrawal and hoarding of gold and the provision of the Thomas amendment⁶ *making all coins and currencies legal tender for all debts*. Additional and immediate legislation is necessary to remove the disturbing effect of this uncertainty and to insure the success of the policy by closing possible *legal loopholes* and removing inconsistencies."⁷ (Italics supplied.) The comprehensive language of the Resolution was intended—as by its terms it did—to close "legal loopholes" contributing to "dislocation of the domestic economy which would be caused by such a disparity of conditions in which, it is insisted, those debtors under gold clauses should be required to pay one dollar and sixty-nine cents in currency while respectively receiving their taxes, rates, charges and prices on the basis of one dollar of that currency."⁸ Here, the admitted purpose of the multiple currency provision supplementing the gold clause was the same as that of the

⁶ 48 Stat. 51, § 43.

⁷ Sen. Rep. No. 99, 73d Cong., 1st Sess.

⁸ Norman v. B. & O. R. Co., *supra*, 315-16.

gold clause itself, that is, to afford creditors of United States debtors on domestic money obligations contractual protection against possible depreciation of United States money. It was a plan, wholly legal when contrived, specifically designed to require debtors to pay 1912 gold dollars or fixed amounts in foreign currencies which were the exact equivalents of gold dollars in 1912. In purpose, pattern and, as shown here, in result, the multiple currency provision is identical with the practice Congress declared to be against public policy, and it furthers a mischief which the Resolution was enacted to end.

The mischief Congress intended to end will not end if the multiple currency provision of these bonds is held to be unaffected by the Resolution. Congress sought to outlaw all contractual provisions which require debtors, who have bound themselves to pay United States dollars, to pay a greater number of dollars than promised. The Resolution intended that debtors under obligation to pay dollars should not have their debts tied to any fixed value of particular money, but that their entire obligations should be measured by and tied to the actual number of dollars promised, dollar for dollar. A multiple currency provision was inserted in these bonds in order to tie this debtor to a fixed value of particular money, and, relying upon this provision, petitioners demand more dollars than promised in the bonds. The provision is thus clearly at cross purposes with the Resolution. By a simple mathematical calculation translating guilder value into dollar value, petitioners will, if the Resolution is not applied to them, enforce the obligations of this debtor, not dollar for dollar as the Resolution provides, but more than a dollar and a half for every dollar borrowed, and the purpose of Congress, that no such premium need be paid, will be completely defeated.

When the Joint Resolution was enacted the railroad had by its promise assumed obligations to pay its bonds in dollars; its obligations were therefore "payable in money of the United States" and so fall squarely within the letter, as well as the spirit of the Resolution making obligations dischargeable by payment of current United States legal tender money.

There remains the argument of petitioners that the Resolution, if construed to forbid enforcement of the option to demand payment in guilders, nullifies contractual rights in violation of the Fifth Amendment to the Constitution. But, as has already been pointed

out, the contracts on which the claims for guilders rest are domestic obligations, controlled by and to be interpreted under the law of the United States. And contracts between private parties cannot create vested rights which serve to restrict and limit an exercise of a constitutional power of Congress.⁹ These bonds and their securing mortgage were created subject not only to the exercise by Congress of its constitutional power "to coin money, regulate the value thereof, and of foreign coin," but also to "the full authority of the Congress in relation to the currency." The extent of that authority of Congress has been recently pointed out: "The broad and comprehensive national authority over the subjects of revenue, finance and currency is derived from the aggregate of the powers granted to the Congress, embracing the powers to lay and collect taxes, to borrow money, to regulate commerce with foreign nations and among the several States, to coin money, regulate the value thereof, and of foreign coin, and fix the standards of weights and measures, and the added express power 'to make all laws which shall be necessary and proper for carrying into execution' the other enumerated powers."¹⁰

Under these powers, Congress was authorized—as it did in the Resolution—to establish, regulate and control the national currency and to make that currency legal tender money for all purposes, including payment of domestic dollar obligations with options for payment in foreign currencies. Whether it was "wise and expedient" to do so was, under the Constitution, a determination to be made by the Congress.¹¹ The Resolution that made these creditors' bonds dischargeable in the same United States legal tender which other creditors in this country must accept, does not contravene the Fifth Amendment.

Our conclusion that the Joint Resolution makes petitioners' claims in bankruptcy allowable dollar for dollar renders consideration of subsidiary questions unnecessary.

The judgments are

Affirmed.

⁹ *Norman v. B. & O. R. Co.*, *supra*, 306-311; cf., *Home Bldg. & L. Assn. v. Blaisdell*, 290 U. S. 398, 435.

¹⁰ *Norman v. B. & O. R. Co.*, *supra*, 303.

¹¹ *Juilliard v. Greenman* (Legal Tender Case), 110 U. S. 421, 448, 450.

SUPREME COURT OF THE UNITED STATES.

Nos. 384 and 495.—OCTOBER TERM, 1938.

Guaranty Trust Company of New York,
as Trustee Under St. Louis South-
western Railway Company First Ter-
minal and Unifying Mortgage, Dated
January 1, 1912, Petitioner,

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vs.

Berryman Henwood, Trustee of St. Louis
Southwestern Railway Company, et al.

Chemical Bank & Trust Company, as
Trustee Under St. Louis Southwestern
Railway Company General and Re-
funding Mortgage, Dated as of July 1,
1930, Petitioner,

495

vs.

Berryman Henwood, Trustee of St. Louis
Southwestern Railway Company, Debt-
or, and St. Louis Southwestern Rail-
way Company.

On Writs of Certiorari
to the United States
Circuit Court of Ap-
peals for the Eighth
Circuit.

[May 22, 1939.]

Mr. Justice STONE, dissenting.

Without considering the question whether the bondholders in these cases have properly exercised their options, I cannot agree that the Joint Resolution of Congress of June 5, 1933, has set at naught the promise of the bonds to pay guilders to the holders at their election.

In each case the bonds contain alternative and mutually exclusive undertakings. The holder could if he wished demand payment in United States gold dollars of a fixed standard or their equivalent in United States currency. The alternative promise is for payment abroad of specified amounts of any one of several foreign currencies, without reference to their gold value at the time of pay-

ment. Its performance is as independent of gold or gold value as if it had called for the delivery of a specified amount of wheat, sugar or coffee, or the performance of specified services.

Any construction of the gold clause resolution which would in the circumstances of the present case preclude payment in foreign money would equally forbid performance of an alternative promise calling for the delivery of a commodity or the rendition of services. Hence the decisive question is whether the resolution admits of a construction which would compel one whose contract stipulates for delivery at his option of a cargo of sugar to accept instead payment of a specified amount in legal tender dollars, merely because by the terms of his contract he might have demanded, though he did not, an equal number of gold dollars.

When the Joint Resolution was adopted there were many obligations of American citizens payable abroad exclusively in foreign currency, and the attendant devaluation of the dollar greatly increased the burden of performance of such contracts through the necessity of purchasing with depreciated dollars the foreign exchange required for their fulfillment. But it must be conceded that Congress did not undertake to relieve any American citizen of that burden, and it is not contended that the Joint Resolution provided for the discharge of any obligations payable in foreign currency, not measured in gold, except in the case where the promise to pay in foreign money is an alternative for the promise to pay in dollars. After devaluation of the dollar the burden on American citizens of meeting obligations abroad by payment in foreign currencies may well have been as great whether the undertaking was unconditional or to pay upon a condition which had happened, or whether the obligation was to pay in a foreign currency or to supply goods which must be acquired by the expenditure of depreciated dollars.

We can find nothing in the legislative history of the Joint Resolution or its language to suggest any Congressional policy to relieve from the one form of obligation more than another, or to indicate that the resolution was aimed at anything other than provisions calling for payment in gold value or gold dollars or their equivalent, which Congress explicitly named and described as the evil to be remedied, both in the Joint Resolution itself and in the committee reports attending its adoption. See Sen. Rep. No. 99, 73d Cong., 1st Sess.; H. R. Rep. No. 169, 73d Cong., 1st Sess.

The Joint Resolution of Congress and the committee reports make no mention of obligations dischargeable in foreign currencies or by

delivery of commodities or performance of services. If it was the purpose of Congress to control such obligations through the exercise of its power to regulate the value of money, that fact must be discoverable from the language of the resolution or from some underlying public policy, to which its words and the records of Congress give no clue. Shortly before the adoption of the resolution, Congress had authorized the President to devalue the dollar. By appropriate legislation and executive action, gold payments by the Treasury had been suspended, the hoarding of gold and its exportation had been prohibited, and all persons had been required to deliver gold owned by them to the Treasury. See *Norman v. Baltimore & Ohio Railroad Co.*, 294 U. S. 240, 295 *et seq.* It was obvious that these measures, aimed at the suppression of the use of gold as a standard of currency value, would fail of their purpose unless all payments in gold of the established standard or its equivalent were outlawed. The reports of the Congressional committees recommending the adoption of the resolution indicate clearly enough that such was its purpose. They give no hint that more was intended. See Sen. Rep. No. 99, 73d Cong., 1st Sess.; H. R. Rep. No. 169, 73d Cong., 1st Sess.

The recitals of the Joint Resolution declare that it is aimed at "the holding of or dealing in gold" and the "provisions of obligations which purport to give the obligee a right to require payment in gold or a particular kind of coin or currency of the United States, or in an amount in money of the United States measured thereby". No other purpose is suggested. The enacting part of the resolution proscribes "every provision . . . which purports to give the obligee a right to require payment in gold or a particular kind of coin or currency, or in an amount in money of the United States measured thereby", and declares "Every obligation, heretofore or hereafter incurred, whether or not any such provision is contained therein or made with respect thereto, shall be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender" "Obligation", it states, "means an obligation . . . payable in money of the United States". Thus the resolution proclaims that it is aimed at gold clauses and declares, if language is to be taken in its plain and most obvious sense, that provisions requiring payment in gold dollars or measured by gold are illegal and that every promise or obligation

"payable in money of the United States" (not in guilders) shall be discharged "dollar for dollar" in legal tender currency.

To arrive at the conclusion that the resolution compels the present bondholders to accept dollars instead of the guilders for which they have contracted, it is necessary to say that "obligation", which the Joint Resolution defines as obligation "payable in money of the United States" and requires to be discharged "dollar for dollar" in legal tender, includes the obligation payable in guilders. This difficulty is bridged by recourse to a major operation of statutory reconstruction. It is said that "obligation" means, not the obligation or promise which is defined by the resolution as that "payable in money of the United States" and in which the gold clause provision is "contained" and "with respect" to which the provision is "made", but includes all obligations, although not dischargeable in money of the United States or in gold, which may be written into the instrument or document containing alternative promises, one of which is to pay in dollars. The "obligation" of the resolution "with respect" to which the gold clause is "made" is thus treated as synonymous with the instrument containing the multiple obligations, and all the provisions in it (not alone the promise to pay dollars) are now held to be dischargeable in dollars merely because one of the alternative promises "contained" a provision payable in "money of the United States", although the bondholder is entitled by his contract to demand performance of a promise to pay guilders not measured by gold. Thus, starting with a resolution avowedly directed at gold clauses, we are brought to the extraordinary conclusion that a promise to pay foreign currency is void if expressed in an instrument containing an alternative promise to pay in money of the United States whether of gold standard or not.

The argument is not persuasive both because it rests upon a strained and unnatural construction of the resolution and upon an assumption that there was a Congressional policy to strike down provisions for the alternative discharge of dollar obligations by payment in foreign currency not tied to gold, which finds no support in the language of the Joint Resolution or its legislative history. It seems fair to suppose that if Congress proposed to end all possibility of creating an international market for bonds payable in dollars or alternatively abroad in foreign currencies, both without gold value, it would have given some more explicit indication of that purpose than is exhibited by the Joint Resolution. Even if

we assume that Congress would have struck down such alternative currency clauses had it considered the matter, we are not free to do what Congress might have done but did not, or what we may think it ought to have done to lessen the rigors of our own currency devaluation for those who had made contracts for payment abroad in foreign currency without gold value.

In any case it seems plain that if Congress had made the attempt it would not have chosen to do so in terms which, if the Court's construction of the Joint Resolution be accepted, are broad enough to strike down every conceivable provision for payment in foreign currency, delivery of commodities, or performance of services as an alternative for a promise to pay dollars, whether of gold standard or not.

The CHIEF Justice, Mr. Justice McREYNOLDS and Mr. Justice BUTLER concur in this opinion.

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